This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

NEW YORK PUBLIC LIBRARY

PURCHASED FROM FUND BEQUEATHED BY

JANE DUGDALE

IN MEMORY OF HER BROTHER

RICHARD L. DUGDALE

A TREATISE

ON

THE LAW OF CRIMES

NEW YORK PUBLIC LIBRARY

BY

WM. L. CLARK

AND

WM. L. MARSHALL

IN TWO VOLUMES
VOL. I.

ST. PAUL
KEEFE-DAVIDSON LAW BOOK CO.
1900

THE NEW YORK
PUBLIC LIBRARY
184656
ASTOR, LENOX AND
TILDEN FOUNDATIONS
1911

NEW YORK
PUBLIC
LIBRARY

Copyright 1900
by
KEEFE-DAVIDSON LAW BOOK CO.

Webb Publishing Co., Press, St. Paul.

PREFACE.

In the preparation of this work, the purpose has been to present the general principles of the common law in relation to crimes, and to show in a general way the extent to which they have been modified by statute. The principal statutory crimes, as embezzlement and the obtaining of money or property by false pretenses, have also been treated at some length. Much care has been taken in the analysis, and in the insertion of catch lines, in order that each principle of the law may stand out before the eye, separate from other principles. This plan will not only make it easy for one to find any given principle without unnecessary loss of time in searching, but it will also make it easier for him to comprehend and remember what he reads.

The cases cited have all been carefully examined, and will be found to be in point. Indeed the work has been almost entirely prepared from the cases themselves. It may, perhaps, be thought by some that more cases have been cited than are necessary for the use of the student, but it is believed by the authors that this will make the work more useful.

By the courteous permission of Professor Joseph Henry Beale, of the Harvard Law School, the cases in his excellent selection of cases on the criminal law have been exhaustively cited throughout the work.

Since the American Decisions, American Reports, and American State Reports are to be found in the libraries of most of the law schools,

and in the libraries of many practitioners, it has been deemed advisable to cite these publications.

It is not out of place to refer here to the idea which seems to be prevalent among practitioners who have little or no practice in the criminal courts, and among students, that the criminal law is of so little importance to them that it is not necessary to know much about it. This idea is very erroneous. Aside from the fact that no one can be a well-educated lawyer who has not a comprehensive knowledge of the criminal law, a knowledge of the criminal law is often of the utmost importance in the practice of every lawyer, whatever may be his specialty. This is well illustrated by a late case, in which an action was brought on an insurance policy, and the question arose whether the insured, at the time he was injured, was engaged in an attempt to kill game in the close season, and therefore engaged in the commission of a crime, so as to prevent a recovery on the policy. It appeared that he had merely started out with a loaded gun with intent to shoot game, and it was held that this was not an attempt to kill game, but mere preparation. It is perhaps safe to say that a large majority of insurance lawyers in the country would not make this distinction without looking the question up. Every lawyer should at least be familiar with the general principles of the criminal law, whether he expects to practice in that branch of the law or not.

One who uses this work will find it of benefit to examine and refer to the table of contents printed at the beginning, as it is a complete analysis of the entire work. The index has been prepared with care, and is very full.

WILLIAM L. CLARK,
WILLIAM L. MARSHALL.

New York City, December 8, 1900.

TABLE OF CONTENTS.

CHAPTER I.

NATURE OF CRIME IN GENERAL.

1. Definition.
2. The Distinction Between Public and Private Wrongs.
3. Treason, Felonies, and Misdemeanors.
4. Infamous Crimes.
5. Crimes Mala in Se and Mala Prohibita.
6. The Merger of Offenses.

CHAPTER II.

SOURCES OF THE CRIMINAL LAW.

1. Necessity for Prohibition by Law.

7. In General.
8. Abolition of the Common Law.
9. Repeal of Law after Commission of Act.

2. The Common Law.

10. Definition.
11. The English Common Law.
12. The Common Law in the United States.
    (a) Offenses Against the States.
    (b) Offenses Against the United States.
    (c) Offenses in the District of Columbia.
13. How the Common Law is Evidenced and Determined.
14. Abolition of the Common Law.
15. Acts and Omissions Prohibited and Punished at Common Law—In General.
16. Frauds in General.

17. Trespasses in General.
18. Nuisances in General.
19. Particular Crimes and Their Classification—In General.
20. Offenses Against the Persons of Individuals.
21. Offenses Against the Property of Individuals.
22. Offenses Against the Habitations of Individuals.
23. Offenses Especially Affecting the Commonwealth and the Government—In General.
24. Offenses Affecting the Administration of Justice.
25. Offenses Affecting the Public Peace.
26. Offenses Affecting the Public Trade.
27. Offenses Affecting the Public Health and Comfort.
28. Offenses Affecting the Public Morals or Sense of Decency.
29. Offenses Affecting the Administration of the Government.
30. Offenses Against God and Religion.
31. Offenses Against the Law of Nations.

3. The Statute Law.

32. In General.
33. Power of the State Legislatures.
34. Power of Congress.
35. Power of the Territorial Legislatures.
36. Constitutional Limitations—In General.
37. Due Process of Law in General.
38. Right to Follow Lawful Business or Occupation.
39. Right to Make Contracts.
40. Class Legislation.
41. The Police Power in General.
42. Regulations as to Food Products.
43. Regulation of Places of Amusement.
44. Ex Post Facto Laws.
45. Indefiniteness of Statutes.
46. Construction of Statutes—In General.
47. Rules to Aid in Construction.

(a) Ordinary Meaning of Language.
(b) Strict Construction.
(c) Reason and Purpose of Statute.
(d) Preamble and Title of Act.
(e) Construction with Reference to the Common Law.
(f) Change of the Common Law.
(g) Prior Judicial Construction.
(h) Construction as a Whole—Giving Effect to All Parts.
(i) Construction of Statutes Together.
(j) Construction in Connection with the Constitution.
(k) Expression of One Thing as an Exclusion of Others.
(l) Special Enumeration Followed by General Words.
(m) Punctuation.
48. Intention to Make Prohibited Act a Crime.

4. Expiration and Repeal of Laws.

49. In General.
50. Implied Repeal of Statutes.
51. Implied Repeal of the Common Law.
52. Effect of Expiration or Repeal.
53. Repeal of Repealing Law.

CHAPTER III.

THE CRIMINAL INTENT AND CAPACITY TO COMMIT CRIME.

1. Criminal Intent in General.

54. Necessity for a Criminal Intent—In General.
55. Necessity at Common Law.
56. Necessity in Statutory Offenses.
(a) In General.
(b) Construction of Statutes.
(c) Particular Cases.
57. Ignorance of Law.
58. Criminal Intention Presumed from Act.

59. Responsibility for Unintended Results.
(a) In General.
(b) Intention to Commit a Crime.
(c) Immoral Acts.
(d) Consequences not Natural or Probable.
(e) Acts Merely Mala Prohibita, and Mere Civil Wrongs.
60. Willfulness.
61. Wantonness.
62. Malice.
(a) In General.
(b) Wrongful Intent Necessary.
(c) Reckless and Wanton Acts.
(d) Restricted Sense of "Malice."
(e) Express and Implied Malice.
63. Specific Criminal Intent.
(a) In General.
(b) May be Inferred from Act.
64. Motive.
(a) Absence of Motive.
(b) Good Motive.
65. Religious Belief.
66. Repentance and Change of Intent.
67. Negligence.
(a) Negligent Acts of Commission.
(b) Omission to Act.
(c) Offenses Requiring a Specific Intent.

2. Ignorance or Mistake of Fact.

68. In General.
69. Mistake of Fact at Common Law.
70. Mistake of Fact in Statutory Offenses.
(a) In General.
(b) Particular Statutes.
(c) Bigamy and Adultery.
(d) Illegal Voting.
(e) Keeping Disorderly House.
71. Effect of Being Engaged in Unlawful Act.
(a) In General.
(b) Immoral Acts.
(c) Acts Merely Mala Prohibita.
(d) Mere Civil Wrongs.

72. Negligence.

3. IGNORANCE OR MISTAKE OF LAW.

73. In General.
74. Reasonable and Unavoidable Ignorance of Law.
75. Mistake of Law Negativing Specific Intent.

4. JUSTIFICATION.

76. In General.
77. Public Authority.
    (a) In General.
    (b) Laws have no Extraterritorial Operation.
78. Domestic Authority.
79. Prevention of Offenses.
80. Defense of One's Person or Property.
    (a) In General.
    (b) Defense of One's Person.
    (c) Defense of One's Property.
    (d) Necessity for Defense.
81. Defense of Others.
82. Necessity. ✓
    (a) In General.
    (b) Larceny.
    (c) Homicide to Save Life.
    (d) Failure to Repair Highway.
    (e) Joining Rebellion.
    (f) Crew Deposing Master.
    (g) Stopping a Vehicle in the Street.
    (h) Selling Intoxicating Liquor.
    (i) Sunday Labor.
83. Compulsion and Command.
    (a) In General.
    (b) Threats of Future Injury.
    (c) Threats of Injury to Property.
    (d) Continuance after Cessation of Danger.
    (e) Command of Husband.
    (f) Command of Parent, Master, or Other Superior.
84. Custom and Usage.

5. Responsibility of Married Women.

85. In General.
86. Particular Offenses.
87. Presumption of Coercion and Rebuttal Thereof.

6. Responsibility of Infants.

88. In General.
89. Children under the Age of Seven.
90. Children Between the Ages of Seven and Fourteen.
91. Children over the Age of Fourteen.
92. Incapacity Other Than Mental.
    (a) In General.
    (b) Physical Incapacity.
    (c) Effect of Privilege as to Contracts.

7. Responsibility of Insane Persons.

93. In General.
94. Tests of Responsibility in General.
95. Capacity to Distinguish Between Right and Wrong.
96. Insane Delusions.
    (a) In General.
    (b) Connection Between the Delusion and the Act.
    (c) Erroneous Belief Based upon Reasoning and Reflection.
97. Insane Irresistible Impulse.
    (a) View That It is No Defense.
    (b) Contrary and More Reasonable View.
98. Moral and Emotional Insanity, So Called.
99. Periodical Insanity.

8. Responsibility of Drunken Persons.

100. In General.
101. Voluntary Drunkenness.
    (a) In General.
    (b) Does not Aggravate Offense.
102. Use of Morphine and Cocaine.
103. Drunkenness of Insane Person.

104. Involuntary Drunkenness.
105. Settled Insanity or Delirium Tremens.
106. Drunkenness Negativing Commission of the Act.
107. Drunkenness Negativing Specific Intent or Knowledge.
(a) Specific Intent.
(b) Knowledge.
(c) Degree of Drunkenness.
108. Homicide Cases.
(a) Murder at Common Law.
(b) Statutory Degrees of Murder.
(1) First Degree.
(2) Second Degree.
(3) Intent Conceived before Becoming Drunk.
(c) Manslaughter.

9. Responsibility of Corporations.

109. In General.
110. Nonfeasance.
111. Misfeasance.
112. Offenses Involving Personal Violence or Evil Intent.
113. Municipal Corporations.

10. Concurrence of Act and Intent.

114. In General.
115. Ratification of Another's Act.

CHAPTER IV.

THE CRIMINAL ACT—IN GENERAL.

1. Necessity for a Criminal Act.

116. In General.
117. Mere Intention to Commit a Crime.
118. Act Intended as, but not Constituting, a Crime.

2. Attempt to Commit Crime.

119. In General.

120. What Attempts are Indictable.
(a) In General.
(b) Suicide.
(c) Misdemeanor Merely Mala Prohibita.
(d) Attempt to Commit an Attempt.
121. The Intent.
122. The Act in General--Intention and Attempt Distinguished.
123. Preparation and Attempt Distinguished.
124. Acts Going Beyond Mere Preparation.
125. Mere Solicitation.
126. Abandonment of Purpose.
127. Adaptation of Means to Accomplishment of Purpose.
128. Physical Impossibility to Commit Intended Crime.
129. Legal Impossibility to Commit Intended Crime.

3. SOLICITATION TO COMMIT CRIME.

130. In General.
131. Solicitation to Commit a Felony.
132. Solicitation to Commit a Misdemeanor.
133. Solicitation not Indictable as an Attempt.

4. CRIMINAL CONSPIRACY.

134. In General.
135. Overt Act not Necessary.
136. The Conspiring or Agreement.
137. The Unlawful Purpose—In General.
138. The Means to be Employed.
139. Conspiracy to Commit Crime—In General.
140. Conspiracy to Pervert or Obstruct Justice.
141. Conspiracy to Do Immoral Acts.
142. Conspiracy to Commit a Mere Private Wrong—In General.
143. Conspiracy to Commit a Trespass.
144. Conspiracy to Defraud.
145. Conspiracy to Slander or Extort Money.
146. Conspiracy to Injure Another in His Trade or Calling.
147. Conspiracy to Do Acts Prejudicial to the Public Generally.

148. Combinations Among Workmen.
149 Conspiracy to Raise or Lower Prices.

5. CONSENT AS BETWEEN INDIVIDUALS.

150. In General.
151. Going Beyond the Consent.
152. Persons Incapable of Consenting.
153. Consent Induced by Duress.
154. Consent Induced by Fraud.

6. RECOVERY IN CIVIL ACTION.

155. In General.

7. SETTLEMENT AND CONDONATION.

156. In General.

8. WRONG OF PERSON INJURED.

157. In General.

9. CONTRIBUTORY NEGLIGENCE OF PERSON INJURED.

158. In General.

10. CONTRIBUTORY ACTS OR NEGLIGENCE OF THIRD PERSONS.

159. In General.

11. ENTRAPMENT.

160. In General.
161. Conduct Involving Consent.
162. Instigation.

CHAPTER V.

PARTIES IN CRIMES.

1. IN GENERAL.

163. Classification of Parties.

164. Offenses in Which the Distinctions are Recognized.
(a) In General.
(b) Statutory Offenses.
(c) Petit Larceny.
(d) Homicide.
165. Prosecution and Punishment.
(a) Principals in the Second Degree.
(b) Accessaries.

2. PRINCIPALS IN THE FIRST DEGREE.

166. Definition.
167. Inanimate Agency.
168. Innocent Human Agent.
169. Several Persons Committing Offense.

3. PRINCIPALS IN THE SECOND DEGREE.

170. Definition.
171. Guilty Principal in the First Degree.
172. Presence When the Offense is Committed.
173. Constructive Presence.
174. Participation in the Offense.
175. Criminal Intent.

4. ACCESSARIES BEFORE THE FACT.

176. Definition.
177. Guilty Principal in the First Degree.
178. Absence When the Offense is Committed.
179. The Procurement, Command, or Counsel.
180. Criminal Intent.

5. ACCESSARIES AFTER THE FACT.

181. Definition.
182. The Commission of the Felony.
183. Knowledge of Commission of the Felony.
184. The Relief or Assistance.
185. Persons Occupying Particular Relations.

6. ACTS FOR WHICH ACCOMPLICES ARE RESPONSIBLE.

186. In General.

187. Acts for Which Accomplice is not Responsible.
188. Acts for Which Accomplice is Responsible.
189. Homicide or Assault in Order to Escape.
190. Acts not Criminal on the Part of the Person Committing Them.

7. PERSONS WHO MAY BE AIDERS AND ABETTORS OR ACCESSARIES.

191. In General.

8. COUNTERMAND OR WITHDRAWAL.

192. In General.

9. PRINCIPAL AND AGENT, AND MASTER AND SERVANT.

193. In General.
194. Responsibility of Principal or Master.
(a) Acts Directed or Authorized.
(b) Acts Impliedly Authorized—Consent or Acquiescence.
(c) Unauthorized Acts.
(d) Negligence of Principal or Master.
(e) Libel.
(f) Nuisance.
(g) Statute Dispensing with Authority or Knowledge.
(h) Presumption of Authority.
(i) Ratification of Unauthorized Act.
195. Responsibility of Agent or Servant.
196. Partners.

CHAPTER VI.

OFFENSES AGAINST THE PERSONS OF INDIVIDUALS.

1. ASSAULTS AND ASSAULT AND BATTERY.

197. In General.
198. The Act Constituting an Assault.
199. Battery.

200. Intention to Commit a Battery.
201. Apparent Intention.
202. Conditional Offer of Violence.
203. Accident.
204. Negligence.
205. Unintentional Injury in Doing Unlawful Act.
206. Ability to Commit a Battery.
207. Aggravated Assault—In General.
208. Specific Intent.
209. Assault with a Deadly Weapon.
210. Ability to Commit Intended Crime.
211. Lawful Force—Justification.
212. Self-Defense.
213. Resisting Unlawful Arrest.
214. Defense of Property.
215. Defense of Others.
216. Effect of Consent in General.
217. Fighting, and Breaches of the Peace.
218. Submission Through Fear.
219. Persons Incapable of Consenting.
220. Consent Induced by Fraud.

2. MAYHEM.

221. Definition.
222. Nature of the Offense.
223. Intent—Malice.

3. FALSE IMPRISONMENT.

224. Definition.
225. The Detention.
226. Unlawfulness of Detention.
227. Intent—Malice.

4. KIDNAPPING.

228. Definition.
229. Nature of the Offense.

5. ABDUCTION.

230. Definition.
231. Particular Statutes.

232. Construction of the Statutes.

6. HOMICIDE.

(A) The Homicide.

233. Definition.
234. The Subject of a Homicide.
(a) In General.
(b) Infanticide—Unborn Children.
(c) Criminal Sentenced to Death.
(d) Alien Enemies.
235. Manner of Causing Death.
(a) In General.
(b) Omission to Act.
(c) Working upon the Feelings—Fright, Grief, etc.
(d) Compelling One to Kill Himself.
(e) Killing by an Innocent Third Person.
236. Causal Connection—In General.
237. Contributing Causes.
(a) In General.
(b) State or Condition of Deceased at Time of Injury.
(c) Conduct of Deceased at Time of Injury.
(d) Contributory Negligence.
(e) State or Condition of Deceased after Injury.
(f) Conduct of Deceased after Injury.
(g) Acts or Omissions of Third Persons.
(1) In General.
(2) Act or Negligence of Physician or Surgeon.
238. Lapse of Time Between Injury and Death.

(B) Murder at Common Law.

239. Definition.
240. Malice Aforethought.
(a) In General.
(b) Deliberation and Premeditation.
(c) Express and Implied Malice.

241. Actual Intent to Kill.
(a) In General.
(b) Killing a Person not Intended.
242. Absence of Actual Intent to Kill—In General.
243. Intention to Inflict Great Bodily Harm.
244. Acts or Omissions Tending to Cause Death or Great Bodily Harm.
(a) In General.
(b) Use of a Deadly Weapon.
(c) Assault with the Hands or Feet Only.
(d) Setting Fire to a Building
(e) Committing or Attempting to Commit an Abortion.
245. Reckless and Wanton Acts.
246. Circumstances Showing an Abandoned and Malignant Heart.
247. Willful Omission to Perform a Legal Duty.
248. Homicide in the Commission of a Felony.
(a) In General.
(b) Attempt to Commit Suicide.
(c) Statutory Felonies.
249. Homicide in Resisting Arrest or Obstructing Officer.

(C) Suicides.

250. In General.

(D) Statutory Degrees of Murder.

251. In General.
252. Particular Statutes.
253. Deliberation and Premeditation.
254. Murder in the Second Degree.

(E) Manslaughter.

(1) *In General.*

255. Definition.

(2) *Voluntary Manslaughter.*

256. Definition.
257. Distinguished from Murder.

258. Intention to Kill.
259. Absence of Malice.
260. The Provocation.
(a) Sufficiency in General.
(b) Assault and Battery.
(c) Unlawful Arrest.
(d) Mutual Combat.
(e) Sight or Knowledge of Wife's Adultery.
(f) Adultery with Sister.
(g) Insulting Words and Gestures.
(h) Trespass upon Land or Goods.
(i) Question of Law or Fact.
261. Cooling of Blood.
(a) In General.
(b) Reasonable Time for Cooling.
(c) Question of Law or Fact.

(3) *Involuntary Manslaughter.*

262. Definition.
263. Malfeasance.
(a) In General.
(b) Assaults, Breaches of the Peace, and Unlawful Games.
(c) Immoderate Correction of Child, Pupil, or Apprentice.
(d) Attempting or Procuring an Abortion.
(e) Riots.
(f) Attempt to Commit Suicide.
(g) Acts Merely Mala Prohibita.
(h) Act Constituting a Mere Civil Wrong.
264. Misfeasance.
(a) In General.
(b) Careless Driving or Bicycling, etc.
(c) Careless Handling of Deadly Weapons, Poisons, and Other Agencies.
(d) Negligence of Physicians and Surgeons.
265. Nonfeasance.
(a) In General.

(b) Negligence of Persons in Charge of Railroad Trains, Machinery, Appliances, etc.
(c) Negligence in Connection with Mines.
(d) Neglect of Children and Other Dependent Persons.
(e) There must be a Duty to Act.

(F) Justifiable and Excusable Homicide.

(1) *Justifiable Homicide in General.*

266. Definition.
267. Execution of Criminals.
268. Homicide to Prevent a Felony.
(a) In General.
(b) Statutory Felonies.
(c) Necessity for the Homicide—Acting on Appearances.
(d) Secret Felonies.
(e) Knowledge.
269. Homicide to Prevent Misdemeanor or Trespass.
270. Homicide in Suppressing a Riot.
271. Homicide in Effecting Arrest or Preventing Escape.
(a) In Cases of Felony.
(b) In Cases of Misdemeanor.

(2) *Excusable Homicide in General.*

272. Definition.
273. Distinguished from Justifiable Homicide.
274. Homicide by Misadventure.
(a) Lawful Acts.
(b) Unlawful Acts.
(c) Negligence.
275. Killing Wife's Paramour.

(3) *Self-Defense.*

276. In General.
277. Justifiable Self-Defense.

278. Excusable Self-Defense.
279. Imminence of the Danger.
280. Acting on Appearances.
281. Duty to Retreat—Excusable Self-Defense.
282. Effect of the Accused being the Aggressor —Justifiable Self-Defense.
283. Original Assault with Malice.
284. Actual Malice at Time of Killing.
285. Killing Innocent Person to Save One's Own Life.

(4) *Defense of Property.*

286. In General.
287. Defense of Habitation.

(5) *Defense of Others.*

288. In General.

7. ABORTION.

289. Definition.
290. At Common Law.
291. Statutory Charges.
292. Justification and Excuse.

8. RAPE.

293. Definition.
294. Force and Want of Consent.
295. Women non Compos Mentis, Insensible, or Asleep.
296. Consent Induced by Intimidation.
297. Consent Induced by Fraud.
298. Carnal Knowledge of Children.
299. The Carnal Knowledge.
(a) Penetration.
(b) Emission.
300. Unlawfulness of Intercourse—Husband and Wife.
301. Persons upon Whom Rape may be Committed.
302. Persons Incapable of Committing Rape.
(a) Boys under Fourteen.
(b) Impotency.

CHAPTER VII.

OFFENSES AGAINST THE PROPERTY OF INDIVIDUALS.

1 LARCENY.

(A) In General.

303. Definition and Classification.

(B) The Subject of Larceny.

304. In General.
305. Real Property.
(a) In General.
(b) Fixtures.
(c) Severance of Property before Taking.
(1) By Owner or by a Third Person.
(2) Severance by the Trespasser.
306. Water and Gas.
307. Must be Property, and the Subject of Ownership.
308. Animals.
(a) In General.
(b) Animals Ferae Naturae.
(c) Animals Reclaimed or Killed.
(d) Animals of a Base Nature, and not Fit for Food.
(e) Dogs.
309. Lost Goods.
310. Property Unlawfully Acquired or Possessed.
311. Choses in Action.
312. Value.
313. Ownership and Possession of the Property.
(a) In General.
(b) Special Ownership or Possession in Another.
(c) Joint Tenants and Tenants in Common—Partners.
(d) Husband and Wife.

(C) The Taking in Larceny.

314. Manner of Taking Possession.
315. Trespass in Taking Possession—In General.
316. Conversion by Persons Having Lawful Possession.
(a) In General.
(b) Conversion by Bailees.
(c) Possession Obtained with Felonious Intent.
(d) Possession Obtained by Fraud, but Without Felonious Intent.
(e) Termination of Right to Possession before Conversion.
(1) In General.
(2) Termination of Right to Possession by Act of Bailee.
(3) Breaking Bulk.
(f) Delivery of Possession by Mistake.
317. Conversion by Persons Having the Bare Custody.
(a) In General.
(b) Larceny by Servants.
(1) Delivery by Master to Servant as Such.
(2) Delivery by Master to Servant as Bailee.
(3) Delivery by Third Person to Servant.
(c) Delivery of Bare Custody to Others than Servants.
318. Consent of the Owner to Part with the Property.
(a) In General.
(b) Delivery by Servant or Agent.
(c) Taking in a Way not Within the Consent.
(1) In General.
(2) Conditional Delivery.
(d) Consent under Duress.
(e) Delivery of Property by Mistake.
319. Finding and Appropriation of Lost Goods.

(a) In General.
(b) Possession Taken with Felonious Intent.
(c) Possession Taken Without Felonious Intent.
(d) Time of Acquiring Possession.
320. Continuing Trespass.
(a) In General.
(b) Taking Property by Mistake.
(c) Obtaining Possession by Fraud.
(d) Continuous Possession of Stolen Property.

(D) The Asportation in Larceny.

321. In General.
322. An Asportation is Necessary.
323. The Slightest Asportation Sufficient.
324. Manner of Asportation.
325. Return of Goods.

(E) The Felonious Intent in Larceny.

326. In General.
327. Fraudulent Intent Necessary.
328. Intent to Deprive the Owner of His Property.
(a) In General.
(b) Dealing in a Way Likely to Deprive the Owner of His Property.
(c) Intent to Sell to Owner or to Return for Reward.
(d) Intent to Pawn.
(e) Intent to Apply in Payment of Debt.
329. Effect of Custom.
330. Lucri Causa.
331. Taking by General from Special Owner.
332. Concurrence of Intent and Trespass and Asportation.
333. Change in Intent.

(F) Grand and Petit Larceny.

334. In General.
335. Determination of Value.

336. Felony or Misdemeanor.

(G) Compound Larcenies.

337. Definition.
338. Robbery.
339. Larceny from the Person.
(a) Statutes Requiring a Private Stealing.
(b) Statutes not Requiring a Private Taking.
(c) Taking "from the Person."
(d) Persons Drunken or Asleep.
(e) Asportation.
(f) Intent.
(g) Robbery Distinguished.
340. Larceny from Particular Places.
(a) In General.
(b) The Place.
(c) The Property must be under the Protection of the House.
(d) Who may Commit the Offense.
(e) Ownership of the Property.
(f) Entry of the Premises.
(g) Asportation.
(h) Intent.

2. Embezzlement.

341. Definition.
342. Object of the Statutes.
343. Particular Statutes.
(a) In General.
(b) Statutes Relating to Banks.
(c) Statutes Relating to Public Officers and Employes.
(d) Embezzlement from the Mails.
344. The Subject of Embezzlement.
(a) In General.
(b) Value.
(c) Ownership.
(d) Property Unlawfully Acquired or Held.
345. Possession at the Time of Conversion.

(a) In General.
(b) Embezzlement by Servants—Delivery to Servant by Master.
(c) Embezzlement by Bailee—Possession Lawfully Acquired.
(d) Persons Other than Servants Having the Mere Custody.
346. Character in Which the Property is Received or Held.
(a) In General.
(b) Relation of Trust or Confidence.
(c) Receipt of Property by Virtue of Employment.
(d) Receipt by Virtue of Office.
(e) Receipt for or in the Name or on Account of Master or Employer.
347. Persons Who are Within the Statutes.
(a) In General.
(b) "Clerks" and "Servants."
(c) "Agents."
(d) "Employes."
(e) "Bailees."
348. The Conversion or Embezzlement.
349. The Intent.

3. CHEATS AND FALSE PRETENSES.

(A) Common-Law Cheats.

350. Definition.
351. Indictable Cheats and Private Frauds Distinguished.

(B) False Private Tokens.

352. In General.
353. Common Law.
354. Statutes.

(C) False Pretenses.

355. In General.
356. The False Pretense—In General.
357. How the Pretense may be Made.

358. Nondisclosure of Facts.
359. Statements as to Future Events and Promises.
(a) In General.
(b) Statements of Intention or Expectation.
(c) Promises.
(d) Statements as to Future Events Accompanied by Statements of Fact.
360. Expression of Opinion or Belief.
361. "Dealers' Talk" or "Puffing."
362. Falsity of Pretense.
363. Pretenses not Calculated to Deceive.
364. The Intent.
(a) Knowledge that the Representation is False.
(b) Intent to Defraud.
(c) Intent to Deprive the Owner of His Property.
365. The Pretense as the Inducement.
(a) In General.
(b) Remoteness of Pretense.
(c) Other Inducements Contributing.
(d) Lapse of Time—Continuing Pretense.
366. Negligence of the Person Defrauded.
367. The Obtaining of the Property.
(a) In General.
(b) The Property, and not Merely the Possession, must be Obtained.
368. Necessity for Injury.
(a) In General.
(b) Obtaining Charity.
(c) Wrong on the Part of the Person Defrauded.
369. The Thing Obtained.

4. ROBBERY.

370. Definition.
371. The Subject of Robbery.
372. The Taking and Carrying Away.
373. Taking from the Person or in the Presence of Another.

374. Force or Violence.
375. Putting in Fear.
(a) In General.
(b) Sufficiency of Threat or Menace.
(c) Fear not Necessary if There is Actual Violence.
376. Consent of the Owner.
377. Taking Need not be "Against the Will" of the Owner.
378. The Felonious Intent.
379. Robbery under the Statutes.
(a) In General.
(b) Robbery in Particular Places.

5. Receiving and Concealing Property Stolen, Embezzled, etc.

380. Receiving Stolen Property.
(a) In General.
(b) At Common Law.
(c) Statutes.
381. The Receiving.
(a) In General.
(b) Receiving from a Receiver.
(c) Husband and Wife.
(d) Principal and Agent—Partners.
(e) Distinguished from Larceny from Thief.
382. Character of the Property as Stolen Property.
383. Knowledge that the Property was Stolen.
384. Fraudulent Intent.
385. License from Owner.
386. Receiving Goods Obtained by Embezzlement, False Pretenses, Robbery, etc.
387. Aiding in Concealment of Stolen Property.

6. Malicious Mischief.

388. In General.
389. Statutes.
390. Common Law.
391. Malice.

7. FORGERY AND UTTERING.

392. Definition.
393. The Subject of Forgery.
394. False Making of Instrument.
(a) In General.
(b) False Writing in One's Own Name.
(c) Using One's Own Name as That of Another.
(d) Using Fictitious or Assumed Name.
(e) Genuine Signature of Third Person.
(f) Obtaining Another's Signature by Fraud.
395. Manner of Making Instrument.
(a) In General.
(b) Alteration of Instruments.
(c) Filling Blanks.
396. Validity or Legal Efficacy of Instrument.
(a) In General.
(b) Apparent Validity or Efficacy.
(c) Similitude of Instrument.
(d) Efficacy Dependent upon Extrinsic Facts.
(e) False Entries in Books of Account.
(f) Recommendations and Certificates of Character.
397. Fraudulent Intent.
398. Actual Injury not Necessary.
399. Uttering Forged Instrument.

CHAPTER VIII.

OFFENSES AGAINST THE HABITATION OF INDIVIDUALS.

1. BURGLARY.

400. Definition and Elements of Offense.
401. Character of Premises.
(a) Dwelling House.
(b) Outhouses Within the Curtilage.
(c) Shops, Stores, etc.
402. Occupancy of Premises.
(a) In General.
(b) Apartment Houses, Hotels, etc.

403. Ownership of Premises.
404. The Breaking.
(a) Necessity for a Breaking.
(b) Technical Meaning of Breaking—Slightest Breaking Sufficient.
(c) Breaking Inner Doors.
(d) Constructive Breaking.
(1) In General.
(2) Entry by Artifice or Fraud.
(3) Entry by Intimidation.
(4) Opening of Door by Servant or Other Inmate.
(5) Entry Through Chimney.
(e) Entry Without Breaking, and Breaking Out.
(f) Entry by One Having a Right to Enter.
(g) Occupant's Consent to the Entry.
405. The Entry.
(a) Necessity for Entry.
(b) Sufficiency of Entry.
406. The Time of Breaking and Entry.
407. The Felonious Intent.
(a) In General.
(b) Intent must Accompany Both Breaking and Entry.
(c) Intent may be Inferred from Circumstances.
408. Commission of Intended Felony.
409. Statutes Relating to Burglary.

2. Arson.

410. Definition and Elements of Offense.
411. Character of Premises.
(a) In General.
(b) Outhouses Within the Curtilage.
412. Occupancy of Premises.
413. Ownership of Premises.
(a) In General.
(b) Husband and Wife.
(c) Occupancy, not Title, is the Test.
414. The Burning.

415. Intent—Malice.
416. Statutory Burnings.

CHAPTER IX.

OFFENSES OTHER THAN AGAINST THE PERSON, PROPERTY, OR HABITATION OF INDIVIDUALS.

1. Offenses Affecting the Public Peace.

417. In General.
418. Trespass and Forcible Entry and Detainer.
419. Affray.
(a) Definition.
(b) The Fighting.
(c) Fighting by Agreement.
(d) Self-Defense.
(e) Public Place.
(f) Terror of the People.
420. Prize Fighting.
421. Dueling.
422. Carrying Weapons.
423. Unlawful Assembly.
424. Rout.
425. Riot.
(a) In General.
(b) Concert of Action.
(c) Distinguished from Treason.
(d) Breach of Peace and Terror to the People.
(e) Number of Persons.
(f) Justification or Excuse.
(g) Acts of One the Acts of All.
426. Disturbance of Public Assembly.
427. Disorderly Houses.
428. Libel.
(a) In General.
(b) Against a Living Person.
(c) Against a Dead Person.
(d) Things Capable of Being Libels.
(e) Publication.
(f) Malice.

(g) Truth of Publication.
(h) Privileged Communications.
(1) In General.
(2) Fair Criticism.
(3) Legislative Proceedings, Public Meetings, and Comments Thereupon.
(4) Proceedings in Courts of Justice.
(5) Reports of Judicial Proceedings.
429. Malicious Mischief.

2. Offenses Affecting the Administration of Justice or Government.

430. In General.
431. Perjury and Subornation of Perjury.
(a) Definitions.
(b) The Proceedings in Which Perjury may be Committed.
(c) Falsity of Testimony.
(d) Knowledge and Intent.
(e) Materiality of Testimony.
(1) In General.
(2) Collateral Matters.
(3) Incompetent Evidence.
(4) Affidavit or Deposition not Used or Informal.
(5) Evidence not Affecting Verdict or Decision.
(6) Incompetency of Witness.
(7) Privileged Testimony.
(8) Voluntary Attendance.
(f) The Oath.
(1) In General.
(2) Materiality of Oath.
(g) Jurisdiction of the Court or Tribunal.
(h) Subornation of Perjury.
432 Bribery.
(a) Definition.
(b) Persons Who are the Subjects of Bribery.

(c) The Bribe.
(d) The Intent.
(e) The Act Induced or Sought to be Induced.
(f) The Offering, Giving, or Receiving of the Bribe.
433. Embracery.
434. Misconduct in Office.
(a) In General.
(b) Unlawful Acts and Abuse of Power.
(c) Extortion.
(d) Oppression.
(e) Fraud and Breach of Trust.
(f) Neglect of Official Duty.
(g) Refusal to Serve an Office.
435. Escape.
(a) In General.
(b) Voluntary Permission of Escape by Officer, etc.
(c) Negligent Permission of Escape.
(d) Liability of Person Escaping.
436. Breaking Prison.
437. Rescue.
438. Compounding Offenses.
439. Misprison of Felony.
440. Barratry.
441. Maintenance and Champerty.
442. Disobedience to Lawful Orders.
(a) Disobedience to a Statute.
(b) Disobedience to Lawful Orders of Court, etc.
443. Libel and Slander of Judicial Officers.
444. Offenses in Connection with Elections.

3. Offenses Affecting the Public Safety, Health, Comfort, etc.

445. In General.
446. Public and Private Nuisances.
447. Nuisances Affecting the Public Health and Safety.
448. Nuisances Affecting the Public Comfort—In General.
449. Disorderly Conduct.

(a) In General.
(b) Common Scold.
(c) Eavesdroppers.
(d) Exciting Public Alarm.
450. Disorderly Houses.
451. Sunday Work, Games, Sports, etc.
452. Obstructing Highways.
453. Failure to Repair Highways.
454. Obstructing Navigable Waters.
455. Pollution of Waters and Watercourses.
456. Justification and Excuse.
(a) Public Necessity and Authority.
(b) Legislative Authority.
(c) Benefit to the Community.
(d) Acquiescence by the Public.
(e) Things not Nuisances when Erected.

4. Offenses Against God and Religion.

457. In General.

5. Offenses Against Morality and Decency.

458. In General.
459. Bigamy.
(a) In General.
(b) The Bigamous Marriage.
(c) Cohabitation.
(d) The Prior Marriage.
(e) Divorce or Annulment of Prior Marriage.
(f) The Criminal Intent.
(g) Death or Absence of Former Spouse.
460. Incest.
461. Sodomy.
462. Fornication and Adultery.
463. Illicit Cohabitation.
464. Seduction.
465. Bawdy Houses.
466. Gaming and Gaming Houses.
467. Obscene Libels.
468. Obscene, Indecent, or Disgusting Exhibitions.
469. Indecent Exposure.

470. Obscene and Profane Language.
471. Blasphemy.
472. Drunkenness.
473. Offenses with Respect to Dead Bodies.

6. Offenses Affecting the Public Trade.

474. In General.
475. Owling.
476. Smuggling.
477. Fraudulent Bankruptcy.
478. Usury.
479. Cheating.
480. Forestalling, Regrating, and Engrossing.
481. Monopolies.

7. Offenses Against the Law of Nations.

482. In General.
483. Piracy.
484. Violation of Safe-Conducts or Passports.
485. Infringement of Rights of Ambassadors.

CHAPTER X.

JURISDICTION AND LOCALITY.

1. Jurisdiction in General.

486. General Rule.
487. Territorial Limits in General.
488. Countries, States, or Counties Bounded by the Sea.
(a) In General.
(b) Bays and Other Arms of the Sea.
(c) Long Island Sound.
489. Rivers and Lakes.
(a) In General.
(b) Hudson River.
(c) Mississippi River—Wisconsin and Minnesota.
(d) The Great Lakes.
490. Vessels of a Nation as a Part of its Territory.
(a) In General.

(b) Concurrent Jurisdiction of Other Nations.
491. Jurisdiction over Foreigners.
(a) In General.
(b) Ambassadors and Consuls.
(c) Belligerents.
(d) Offenses by Foreigners Abroad.
492. Jurisdiction over Subjects or Citizens Abroad.

2. Locality of Offenses.

493. In General.
494. Act Committed in One Jurisdiction, and Taking Effect in Another.
495. Accessaries.
(a) Different Counties.
(b) Different States.
496. Parties Concerned in Misdemeanors.
497. Acts Committed by Means of an Innocent Agent.
498. Conspiracy.
499. Larceny.
(a) In General.
(b) Taking in One County and Carrying into Another.
(c) Taking in One Country and Carrying into Another, or Taking on the High Seas.
(d) Taking in One State and Carrying into Another.
(e) Compound Larceny.
500. Robbery.
501. False Pretenses.
502. Embezzlement.
503. Receiving Stolen Goods.
504. Forgery and Uttering.
505. Homicide.
(a) Injury in One County and Death in Another.
(b) Injury on the High Seas or in One Country or State, and Death in Another Country or State.
(c) Act in One Country, State, or County Taking Effect in Another.

(d) Homicide by Administering Poison.
506. Abortion.
507. Assault and Assault and Battery.
508. Libel.
509. Sending Threatening Letter.
510. Nuisance.
511. Bigamy.

3. State and Federal Jurisdiction.

512. In General.
513. Jurisdiction Conferred upon Congress by the Federal Constitution.
(a) General Clause.
(b) Offenses on the High Seas, and Offenses Against the Law of Nations.
(c) Offenses in the District of Columbia, and in Forts, Arsenals, Dockyards, etc.
(d) Treason.
(e) Revenue and Custom Laws.
(f) Foreign and Interstate Commerce.
(g) Commerce with Indians.
(h) Naturalization.
(i) Bankruptcy.
(j) Counterfeiting Securities and Coin of the United States.
(k) Post Offices and Post Roads.
(l) Patents and Copyrights.
(m) Army and Navy.
(n) Elections.
(o) Slavery and the Slave Trade.
(p) Civil Rights.
514. Exclusive and Concurrent Jurisdiction.
(a) In General.
(b) Forgery, Counterfeiting, and Uttering.
(c) Perjury.
(d) Larceny and Embezzlement.
(e) False Pretenses.
(f) Election Offenses.

(g) Offenses in the Ports or Waters of a State.
(h) United States Forts, Arsenals, Dockyards, etc.
(i) Jurisdiction Conferred by Congress on State Courts.

CHAPTER I.

NATURE OF CRIME IN GENERAL.

1. Definition.
2. Public and Private Wrongs Distinguished.
3. Treason, Felonies, and Misdemeanors.
4. Infamous Crimes.
5. Crimes Mala In Se and Mala Prohibita.
6. Merger of Offenses.

1. Definition of Crime.—A crime is any act or omission prohibited by public law for the protection of the public, and made punishable by the state in a judicial proceeding in its own name.[1] It is a public wrong, as distinguished from a mere private wrong or civil injury to an individual.

Other Definitions.—Various definitions of the term "crime" have been given in the textbooks and in the cases, but few of them are

---

[1] In re Bergin, 31 Wis. 383; People v. Hanrahan, 75 Mich. 611; State v. Ostwalt, 118 N. C. 1208.

"A crime is any wrong which the government deems injurious to the public at large, and punishes through a judicial proceeding in its own name." 1 Bish. New Crim. Law, § 32.

A crime, "in a general sense, implies any act done or omitted in violation of public law, and for which the person is liable to punishment by indictment, presentment, or impeachment," Smith v. Smith, 2 Sneed (Tenn.) 473, 477.

satisfactory. Blackstone's definition—"An act committed or omitted in violation of a public law, either forbidding or commanding it"[2]—has frequently been quoted with approval,[3] but it is inaccurate. In the first place, it is not the "act omitted" that constitutes a crime, but the omission to act, and, in the second place, the term "public law" is too broad, for it includes many other laws besides those which define and punish crimes. An act is not necessarily a crime because it is prohibited by a public law. It is necessary to look further, and ascertain the ground upon which the act is punished, and by whom the punishment is imposed. To constitute a crime, it must be punished to protect the public, and it must be punished by the state or other sovereign power.

Violations of Municipal Ordinances.—By the weight of authority, the violation of a municipal ordinance, enacted by a city under legislative authority, as in the case of ordinances prohibiting and punishing gaming, and the

---

[2] 4 Bl. Comm. 15.

[3] State v. Bishop, 7 Conn. 185; State v. Collins, 1 McCord (S. C.) 355; Slattery v. People, 76 Ill. 220; State v. Peterson, 41 Vt. 511; U. S. v. Eaton, 144 U. S. 677; Withers v. State, 36 Ala. 252.

keeping of gaming houses, bawdy houses, etc., is not a crime, in the proper sense of the term, for such ordinances are not public laws, and the punishment for their violation is imposed by the municipality, and not by the state.[4] For this reason, it has often been held that the state may punish the keeping of a gaming house, bawdy house, or other common nuisance as a crime, notwithstanding the same act has already been punished by the city in which it was committed, as a violation of its ordinances, and that this is not punishing twice for the same offense.[5]

---

[4] Williams v. City Council of Augusta, 4 Ga. 509, 513; Withers v. State, 36 Ala. 252, 261; State v. Boneil, 42 La. Ann. 1110, 21 Am. St. Rep. 413; City of Greeley v. Hamman, 12 Colo. 94; Wiggins v. City of Chicago, 68 Ill. 372; State v. Rouch, 47 Ohio St. 478, 481; Schmelder v. McLane, 36 Barb. (N. Y.) 495, 4 Abb. App. Dec. 154; City of Oshkosh v. Schwartz, 55 Wis. 487; Ex parte Hollwedell, 74 Mo. 395; City of Kansas v. Clark, 68 Mo. 588; Cooper v. People, 41 Mich. 403.

Contra, People v. Hanrahan, 75 Mich. 611; State v. West, 42 Minn. 147; Bautsch v. State, 27 Tex. App. 342.

[5] See State v. Lee, 29 Minn. 445. On this question, however, the decisions are conflicting.

2. The Distinction between Public and Private Wrongs.

Wrongs are of two kinds,—public and private. A *private* wrong, otherwise termed a "tort" or "civil injury," is "an infringement or privation of the civil rights which belong to individuals, considered merely as individuals."[6] A *public* wrong, or crime, is "a breach and violation of the public rights and duties due to the whole community, considered as a community, in its social aggregate capacity."[7] It is a wrong that affects the whole community, and not merely individual members of the community, and therefore the public good requires the state to interfere and punish the wrongdoer. The punishment is imposed for the protection of the public, and not because of the injury to the individual. The latter must seek redress in a civil action.

Illustrations.—For example, if I go upon another man's land wrongfully, but without committing a breach of the peace, I commit a wrong which does not affect the other members of the community to such an extent as to

---

[6] 4 Bl. Comm. 5.

[7] 4 Bl. Comm. 5. See 8 Am. & Eng. Enc. Law (2d Ed.) 279, and cases there cited.

require the state to punish me. I am merely liable in an action for damages by the individual whose rights I have infringed. This is not a public wrong, or crime, but a mere private wrong, or tort.[8] On the same principle, it is a mere private wrong if I maintain a nuisance which affects a single individual only,[9] or, at common law, if I obtain another man's property by a mere lie.[10]

On the other hand, it is a public wrong, or crime, if I go upon another's land under such circumstances as to render me guilty of a breach of the public peace,[11] or if I maintain a nuisance on or near a public highway, so as to affect all who pass, or in a thickly-settled community, so as to affect the whole community,[12] or if I cheat another out of his property

[8] Rex v. Turner, 13 East, 228; Henderson v. Com., 8 Grat. (Va.) 708; Kilpatrick v. People, 5 Denio (N. Y.) 277; post, §§ 17, 418.

[9] See Com. v. Webb, 6 Rand. (Va.) 726; post, §§ 18, 447.

[10] Rex v. Wheatly, 2 Burrows, 1125, Beale's Cas. 97; Com. v. Warren, 6 Mass. 72; People v. Babcock, 7 Johns. (N. Y.) 201; post, §§ 16, 351.

[11] Henderson v. Com., 8 Grat. (Va.) 708; post, §§ 17, 418.

[12] State v. Rankin, 3 S. C. 438; Com. v. Webb, 6 Rand. (Va.) 726; Douglass v. State, 4 Wis. 387; State v. Close, 35 Iowa, 570; post, §§ 18, 447.

by using false weights or measures.[13] In these cases the wrong affects the whole community to such an extent that the public welfare requires the state to interfere and punish me.

Crimes Both Public and Private Wrongs.—A public wrong, or crime, is also a private wrong. Though it affects the community at large, it also affects the individual.[14] Thus, an assault and battery is a crime because of the breach of the public peace, and renders the wrongdoer liable to punishment by the state. It is also a private wrong, for which the individual assaulted may maintain an action for damages.[15] The same is true of a public nuisance, resulting in special damage to an individual, as where a log is placed in a highway, and a traveler is injured by driving against it.[16] So, in the case of the more grievous crimes, like murder, robbery, larceny, etc., a private wrong is involved, and, in most jurisdictions, a civil action, as well as

---

[13] People v. Babcock, 7 Johns. (N. Y.) 201; post, §§ 16, 351.

[14] 4 Bl. Comm. 6.

[15] Post, § 197 et seq.

[16] 4 Bl. Comm. 6.

a criminal prosecution, will now lie.[17] At common law, the punishment for these offences—felonies—was so great, being death and forfeiture of property, that it was not possible to make any reparation for the private wrong.[18]

The Distinguishing Characteristic.—Since the same act may be both a crime and a civil injury,—a crime for the purpose of a prosecution by the state, and a civil injury for the purpose of an action by the individual injured,—it is obvious that the tendency of the act cannot be relied upon alone to determine in any particular case whether it is a crime, and whether the proceeding therefor is a criminal prosecution. The purpose and nature of the proceeding must be considered. As was said by Austin: "The difference between crimes and civil injuries is not to be sought in a supposed difference between their tendencies, but in the difference between the mode wherein they are respectively pursued, or wherein the sanction is applied in the two

[17] 4 Bl. Comm. 6.

[18] 4 Bl. Comm. 6. As to the right to maintain a civil action for acts constituting crime, see works on Torts.

cases. An offense which is pursued at the discretion of the injured party, or his representative, is a civil injury. An offense which is pursued by the sovereign, or by a subordinate of the sovereign, is a crime."[19]

Principles of Law Based upon This Distinction.—It is well to bear in mind the distinction between public wrongs or crimes and mere private wrongs or civil injuries, for many important principles of law are based upon it. Thus, by reason of the fact that a crime is punished for the protection of the public, and not merely because of the injury to the individual, there are many acts which render the doer criminally responsible, notwithstanding the consent of the individual on or against whom they are committed.[20] For the same reason, it is ordinarily no defense in a criminal prosecution to show that the individual particularly injured was himself committing or attempting to commit an offense,[21] or that he was guilty of contributory negligence,[22] or that he has settled with the wrong-

[19] Aust. Jur. § 17.
[20] Post, § 150 et seq.
[21] Post, § 157.
[22] Post, § 158.

doer, or condoned the offense, or recovered damages in a civil action.[23]

3. Treason, Felonies, and Misdemeanors.—Crimes are divided into three classes or grades. These are:

1. Treason.
2. Felonies.
3. Misdemeanors.

The term "crime" is not limited to any particular class, but includes all. A misdemeanor is as much a crime as treason or felony, though not so grievous, and not so severely punished.[24]

---

[23] Post, §§ 155, 156.

[24] Blackstone speaks of "crimes and misdemeanors" (4 Bl. Comm. 5), and there are reported cases in which the distinction is made. This, however, is wrong. The term "crime" includes every offense, whether it be treason or felony, or merely a misdemeanor. Thus, in the case of In re Bergin, 31 Wis. 383, it was held that any wrong against the public which is punishable in a criminal proceeding prosecuted by the state in its own name, or in the name of the people, or of the sovereign, is a "crime," within the meaning of the constitutional prohibition against involuntary servitude, except as a punishment for a crime, and that the term, therefore, includes both felonies and misdemeanors. See, also, State v. Savannah, T. U. P. Charlt. (Ga.) 235, 237; People v. Hanrahan, 75 Mich. 611; Slaughter v. Peo-

Treason.—At common law, treason was divided into high treason and petit treason. *High* treason was the compassing of the king's death, and aiding and comforting of his enemies, the forging or counterfeiting of his coin, the counterfeiting of the privy seal, or the killing of the chancellor, or either of the king's justices; and *petit* treason was where a wife murdered her husband, an ecclesiastic his lord or ordinary, or a servant his master.[25]

In this country, treason against the United States is defined by the constitution of the United States, and consists in the levying of war against the United States, or adhering to their enemies, giving them aid and comfort.[26] In state constitutions or statutes there are similar definitions of treason against the

ple, 2 Doug. (Mich.) 334, note; Van Meter v. People, 60 Ill. 168; State v. Sauer, 42 Minn. 258; State v. Peterson, 41 Vt. 511; Smith v. Smith, 2 Sneed (Tenn.) 473, 477.

A misdemeanor is a "crime," within the meaning of the clause of the federal constitution relating to the surrender of fugitives from justice by one state to another. Morton v. Skinner, 48 Ind. 123.

[25] 4 Bl. Comm. 73 et seq.

[26] Const. U. S. art. 3, § 3. "Treason," as thus defined, is punished by act of congress. See Rev. St. U. S. 1878, § 5331.

state.[27] What was petit treason at common law is in this country simply murder or manslaughter, and a felony.

Felonies.—The chief division of crimes is into *felonies* and *misdemeanors.* The distinction is of great importance.[28]

---

[27] For example, see Const. Mo. art. 2, § 13; Const. Mich. art. 6, § 30; Comp. Laws Mich. 1897, p. 3379; Pen. Code N. Y. § 37; Crim. Code Ill. c. 38, par. 435; Pub. St. Mass. c. 201, § 1; Code Va. 1887, § 3658.

[28] To show the importance of the distinction: In felonies there may be principals and accessaries. In misdemeanors all are principals. Post, § 164. Unintentionally causing death in committing some felony is murder, while to unintentionally cause death in committing a misdemeanor is manslaughter only. Post, §§ 248, 263. To constitute burglary at common law, the house must be broken and entered with intent to commit a felony. Intent to commit a misdemeanor is not enough. Post, § 407. In making an arrest for a felony, a warrant is not necessary, while it is generally necessary to authorize arrest for a misdemeanor. In making an arrest for a felony, but not in making an arrest for a misdemeanor, the accused may be killed, if he cannot otherwise be taken. Post, § 271.

The distinction is also important as regards questions of procedure. Thus, in some jurisdictions, in the case of felonies, but not in the case of misdemeanors, the prosecution must be

At common law, felonies were those offenses which occasioned forfeiture of the lands and goods of the offender, and to which might be added death or other punishment, according to the degree of guilt.[29] Generally the punishment was death, in addition to such forfeiture, subject, however, to the benefit of clergy.[30] The common-law felonies were murder, manslaughter, rape, sodomy, robbery, larceny, arson, burglary, and perhaps mayhem.[31]

In this country there is no forfeiture of property on conviction of crime, but the distinction between felonies and misdemeanors

---

by indictment, and not by information or complaint, the accused must be present during the trial, and the indictment must expressly allege that the act was done "feloniously."

[29] 4 Bl. Comm. 94, 95; Fassett v. Smith, 23 N. Y. 257. See the reference to Blackstone as to the derivation of the term "felony."

[30] As to the benefit of clergy, see 4 Bl. Comm. 365 et seq.; State v. Chambers, 22 W. Va. 779, 46 Am. Rep. 555.

[31] There is doubt whether mayhem was a felony at common law. 2 Bish. New Crim. Law, § 1008. That it was not was held in Com. v. Newell, 7 Mass. 245. See, also, Com. v. Lester, 2 Va. Cas. 198. But Hawkins is to the contrary. 1 Hawk. P. C. c. 44. § 3.

is still recognized, and, as was stated above, it is very important. According to the weight of authority, in the absence of any statute on the subject, we recognize as felonies all those crimes, enumerated above, that were felonies at common law, and only those crimes, whatever may be the punishment imposed.[32]

By Statute.—Many new felonies have, from time to time, been created by statute, and what were merely misdemeanors at common law have in some cases been raised to the grade of felony. Often felonies are created by declaring in express terms that the offense shall be deemed or taken to be a felony, but they may be created by implication. Thus, if a statute creating an offense provides for the punishment of accessaries as such, the offense must be deemed a felony, for, as we shall see, it is only in the case of felonies that

---

[32] Com. v. Newell, 7 Mass. 245; Com. v. Barlow, 4 Mass. 439; State v. Murphy, 17 R. I. 698.

There is a decision to the contrary in New Hampshire. It was there held that the English test of a felony does not apply in this country, but that, even in the absence of a statute, the term applies to all crimes punishable by death or imprisonment in the state prison, and only to such crimes. State v. Felch, 58 N. H. 1.

there can be accessaries.[33] An offense cannot be considered as impliedly made a felony by statute, unless such an intention on the part of the legislature is clear, and the implication is a necessary one.[34]

Offenses Punishable by Death or Confinement in State Prison.—By statute in some states it is expressly declared that all offenses that *are punishable,* or that *may be punished,* by death, or by confinement in the state prison, are felonies.[35] In a few states the confinement must be at hard labor. Some of the

---

[33] Com. v. Macomber, 3 Mass. 254; Com. v. Barlow, 4 Mass. 439; post, § 164.

[34] Thus, where a statute declared that one convicted of a certain offense which was not a felony at common law (assault with intent to murder) should be deemed a "felonious" assaulter, and the same term was used in another statute, by which it was clear that the legislature did not intend to create a felony, it was held that the term might be applied to the disposition of the mind of the assaulter, and not as descriptive of the offense, and that the statute, therefore, did not make the offense a felony. Com. v. Barlow, 4 Mass. 439. And see Com. v. Newell, 7 Mass. 245.

[35] See People v. Lyon, 99 N. Y. 210; Cook v. State, 60 Ala. 39, 31 Am. Rep. 31.

Under such a statute, an offense not punishable

statutes apply only to the term "felony," when used in a statute.[36]

Under such a statute, it is the *possible* punishment—the punishment that may be imposed—that determines whether an offense is

---

by death or by imprisonment in the state prison is not a felony, though it may have been a felony at common law. Shay v. People, 22 N. Y. 317; Nathan v. State, 8 Mo. 631.

A statute which merely changes the punishment for offenses that were felonies at common law from death to imprisonment in the state prison does not have the effect of reducing the grade of such offenses from felony to misdemeanors. The grade remains the same as at common law. State v. Dewer, 65 N. C. 572.

[36] Thus, a statute declaring that the term "felony," when "used in any statute," shall be construed to mean an offense for which the offender, on conviction, shall be liable by law to be punished by imprisonment in the state prison, does not make an offense a felony which was only a misdemeanor at common law, though it may be punished by imprisonment in the state prison, but it merely furnishes a definition of the term "felony," when it is used in some statute. Wilson v. State, 1 Wis. 184; Nichols v. State, 35 Wis. 308.

In Michigan the statute declares that "the term 'felony,' when used in this title, or in any other statute, shall be construed to mean an offense for which the offender, on conviction, shall be liable by law to be punished by death or by imprisonment in the state prison." It is held that

a felony, and not the punishment that is actually imposed in a particular case.[37]

No offense against the United States—that is, no violation of the federal laws—is a fel-

---

this is only a legislative definition of the term, as used in those provisions of the statute where neither the particular offense, nor its grade, is otherwise indicated than by the use of this term; and that those acts which were felonies at common law remain such, notwithstanding the statute, though by statute they may be subjected to a less punishment than that mentioned. Drennan v. People, 10 Mich. 169.

[37] People v. Lyon, 99 N. Y. 210; People v. Hughes, 137 N. Y. 33; People v. War, 20 Cal. 117; Johnston v. State, 7 Mo. 183; Ingram v. State, 7 Mo. 293; State v. Waller, 43 Ark. 381; State v. Mayberry, 48 Me. 218; Rafferty v. State, 91 Tenn. 655; Benton v. Com., 89 Va. 570; State v. Harr, 38 W. Va. 58. And see People v. Brigham, 2 Mich. 550; Firestone v. Rice, 71 Mich. 377, 381; State v. Rouch, 47 Ohio St. 478, 481.

"The maximum punishment to which he is liable to be subjected is the test by which the degree of the crime must be determined." People v. Lyon, supra.

This statutory definition of felony must be construed as relating to the punishment prescribed for the crime, without regard to any personal exemption of the criminal. Therefore, one who is convicted and sentenced for an offense punishable by imprisonment in the state

ony, unless it is expressly declared to be so by an act of congress.[38]

Misdemeanors.—All crimes that are not treason or felony are misdemeanors.

4. Infamous Crimes.

The term "infamous" was applied at common law to crimes disqualifying convicts as witnesses. They included treason and felonies, and also forgery and other misdemeanors affecting, by falsehood and fraud, the administration of justice, such as perjury, conspiracy to falsely accuse one of crime, etc., but did not include cases of cheating, assault and battery, and other mere breaches of the peace,

---

prison is convicted and sentenced for a felony, though by statute, because of his youth, he is sent, not to state prison, but to the house of refuge. People v. Park, 41 N. Y. 21.

In Illinois the decisions are not in accord with this view. The statute in that state declares to be felonies all offenses "punishable" by death or imprisonment in the state prison, and it is held that this means that the offense "must" be so punished, and that an offense which may be punished either by imprisonment in the penitentiary or by a fine only, in the discretion of the jury, is a misdemeanor only. Lamkin v. People, 94 Ill. 501; Baits v. People, 123 Ill. 428.

[38] In re Acker, 66 Fed. 290; U. S. v. Belvin, 46 Fed. 381.

etc.[39] It was the nature of the offense, and not the punishment, that rendered it infamous.

The term, however, is not always used in this sense. It is declared in the federal constitution that no person shall be held to answer for a capital or "otherwise infamous offense," unless on a presentment or indictment by a grand jury, but the term "infamous" is not defined.[40] There are similar provisions in some of the state constitutions and statutes.[41] Some of the lower federal courts have held that this provision only requires an indictment for such offenses as disqualified a witness at common law,[42] but the supreme court has overruled them in a late case, and has decided that any offense is infamous, within the meaning of the provision, that may be punished by death or by imprison-

---

[39] 1 Greenl. Ev. § 373; Ex parte Wilson, 114 U. S. 417; People v. Sponsler, 1 Dak. 289; King v. State, 17 Fla. 183; Com. v. Shaver, 3 Watts & S. (Pa.) 338.

[40] Const. U. S. Amend. art. 5.

[41] See Const. N. Y. art. 1, § 6.

[42] U. S. v. Maxwell, 3 Dill. 275, Fed. Cas. No. 15,750. There are state court decisions to the same effect. People v. Sponsler, 1 Dak. 289.

ment in a state prison, with or without hard labor.[43]

5. Crimes Mala in Se and Mala Prohibita.

Crimes are divided into those that are *mala in se,* or wrong in themselves, and those that are *mala prohibita,* or wrong merely because they are prohibited and punished by statute. Crimes *mala in se* include all common-law offenses, for the common law punishes no act that is not wrong in itself. They include, in addition to felonies, all breaches of the public peace or order, injuries to person or property, outrages upon public decency or good morals, and willful and corrupt breaches of official duty. Acts *mala prohibita* include any act forbidden by stat-

---

[43] Ex parte Wilson, 114 U. S. 417; Mackin v. U. S., 117 U. S. 348; U. S. v. DeWalt, 128 U. S. 393; Ex parte McClusky, 40 Fed. 71.

The term "infamous" has been construed in the same way by some of the state courts. Jones v. Robbins, 8 Gray (Mass.) 329, 349; People v. Hanrahan, 75 Mich. 611.

The test is the possible punishment,—the punishment that may be imposed, and not the punishment actually awarded in the particular case. Ex parte Wilson, supra.

In Illinois, "infamous" crimes are enumerated in the statute, and are murder, rape, kidnapping,

ute, but not otherwise wrong.[44] This distinction has been criticized, but it is clear, and is often of the utmost importance.[45]

6. The Merger of Offenses.

The same act often involves several offenses, felonies, or misdemanors, or both. Thus, every murder or rape, and every robbery by actual violence, includes an assault

---

perjury and subornation of perjury, arson, burglary, robbery, sodomy, or other crime against nature, incest, larceny, forgery, counterfeiting, and bigamy. Crim. Code Ill. c. 38, par. 458.

[44] Com. v. Adams, 114 Mass. 323, 19 Am. Rep. 362, Beale's Cas. 204.

[45] Thus, as we shall see in dealing with assault and battery and homicide, and with criminal intent, a person who, in doing an act, causes results not intended by him, may be punished for such results if his act was malum in se, whereas he may not be punishable if it was merely malum prohibitum. A man who intentionally assaults and beats another is guilty of manslaughter if he unintentionally kills him, because the assault and battery is malum in se. Post, § 263. But it has been held that a person who accidentally drives over and injures another while driving at a speed prohibited by a statute or city ordinance, but not recklessly, is not guilty of a criminal assault and battery (and, if this is true, he would not be guilty of manslaughter if death should result), as the excessive speed is only wrong be-

and battery. Every robbery includes larceny. And when arson is committed, and a person is thereby burned to death, there is both arson and murder. So, if a person breaks and enters a house with intent to steal or rape, and accomplishes his purpose, there is burglary, and also larceny or rape. The question arises in such cases, whether there may be a prosecution for any one of these offenses, at the election of the state, or whether one of them merges and extinguishes the others, so that it alone can be prosecuted. This is what is meant by the merger of offenses.

The common-law rule was that, if the offenses were of different degrees, there was a merger, but not if they were of the same degree. Misdemeanors merged in felonies, as assault and battery in murder, rape, or robbery, and conspiracy to commit a felony in the felony, if committed, etc.[46] But there

cause prohibited by the statute or ordinance. Com. v. Adams, 114 Mass. 323, 19 Am. Rep. 362, Beale's Cas. 204.

[46] Com. v. Kingsbury, 5 Mass. 106; State v. Cooper, 13 N. J. Law, 361, 25 Am. Dec. 490; People v. Bruno, 6 Park. Cr. R. (N. Y.) 657; Lambert v. People, 9 Cow. (N. Y.) 578; People v. McKane,

was no merger of a felony in a felony, as in the case of burglary and rape or larceny, robbery and the included larceny, rape and murder, arson and murder, etc.[47] Nor was there any merger of a misdemeanor in a misdemeanor, as of an attempt or conspiracy to commit a misdemeanor in the misdemeanor when committed.[48]

---

7 Misc. Rep. 478, 28 N. Y. Supp. 397; People v. Thorn, 21 Misc. Rep. 130; People v. Fish, 4 Park. Cr. R. (N. Y.) 206; People v. Richards, 1 Mich. 217; Com. v. Blackburn, 1 Duv. (Ky.) 4; Johnson v. State, 26 N. J. Law, 313.

[47] People v. Bristol, 23 Mich. 118; Hamilton v. State, 36 Ind. 280, 10 Am. Rep. 22; State v. Mayberry, 48 Me. 218, 238.

Statutory felonies, as well as felonies at common law, are within this rule. At common law, an assault with intent to rob is a misdemeanor only, and robbery is a felony. At common law, therefore, an assault with intent to rob merges in the robbery if it is committed. There is no merger, however, if an assault with intent to rob is made a felony by statute, as by a statute making it punishable by imprisonment in the state prison. Hamilton v. State, supra.

[48] State v. Murphy, 6 Ala. 765, 41 Am. Dec. 79; Hamilton v. State, 36 Ind. 280, 10 Am. Rep. 22; State v. Mayberry, 48 Me. 219; State v. Murray, 15 Me. 100; People v. Mather, 4 Wend. (N. Y.) 229, 265, 21 Am. Dec. 122; People v. Richards, 1 Mich. 216; State v. Setter, 57 Conn. 461; Com.

The doctrine of merger of offenses seems to have been repudiated in England.[49] It has also been repudiated in some of our states, and in others the courts have shown a strong

---

v. Blackburn, 1 Duv. (Ky.) 4; Orr v. People, 63 Ill. App. 305; Berkowitz v. U. S., 93 Fed. 452.

If, in the particular jurisdiction, petit larceny is a misdemeanor only, and not a felony, as at common law, a conspiracy to commit petit larceny does not merge in the larceny. State v. Setter, supra.

In a Massachusetts case (Com. v. Kingsbury, 5 Mass. 106), Chief Justice Parsons said that a conspiracy to commit a misdemeanor merges in the misdemeanor, but this was mere obiter dictum, and is not sustained by the authorities. See People v. McKane, 7 Misc. Rep. 478, 28 N. Y. Supp. 397.

[49] In Reg. v. Button, 11 Q. B. 929, the defendants were charged with conspiracy to commit a felony, and the evidence tended to show that the felony was in fact committed. Lord Denman sustained the prosecution for the conspiracy. "A misdemeanor," he said, "which is a part of a felony, may be prosecuted as a misdemeanor, though the felony has been completed." And again, in Reg. v. Neale, 1 Den. C. C. 37, a conviction for carnal knowledge of a young girl, which was a mere misdemeanor, was sustained, though the evidence showed a rape.

tendency to reject it.[50] In some states it has been abolished by statute.[51]

---

[50] See State v. Setter, 57 Conn. 461, 14 Am. St. Rep. 121; State v. Vadnais, 21 Minn. 382; Mitchell v. State, 42 Ohio St. 383.

[51] In Michigan, and some of the other states, there is a statute expressly providing that if, upon the trial of any person for a misdemeanor, the facts given in evidence amount in law to a felony, he shall not, by reason thereof, be entitled to an acquittal of the misdemeanor. Under such a statute, a misdemeanor does not merge in a felony. People v. Arnold, 46 Mich. 268.

In Massachusetts, and some of the other states, it is provided that whenever a person indicted for a felony shall be acquitted of part of the offense charged, and convicted of the residue, he shall be adjudged guilty of the offense, if any, which shall be substantially charged by the residue of such indictment, and shall be sentenced and punished accordingly. Under this statute, misdemeanors do not merge in felonies. Thus, one may be convicted of conspiracy to commit a felony, notwithstanding actual commission of the felony. Com. v. Walker, 108 Mass. 309. And there may be a conviction of assault and battery on an indictment for rape. Com. v. Drum, 19 Pick. (Mass.) 479; Com. v. Dean, 109 Mass. 349. See, also, Glover v. Com., 86 Va. 382, Beale's Cas. 133.

CHAPTER II.

SOURCES OF THE CRIMINAL LAW.

I. NECESSITY FOR PROHIBITION BY LAW, §§ 7-9.
II. THE COMMON LAW, §§ 10-31.
III. THE STATUTE LAW, §§ 32-48.
IV. EXPIRATION AND REPEAL OF LAWS, §§ 49-53.

I. NECESSITY FOR PROHIBITION BY LAW.

7. In General.—To be a crime, an act must be prohibited and made punishable by law, and it must be so, both at the time it is committed, and at the time it is punished.[1] This prohibition is either by (a) the common or unwritten law, or (b) by statute.

8. Abolition of the Common Law.

As we shall presently see at some length, many acts are prohibited and punished by the common or unwritten law, which is that portion of the municipal law which does not rest for its authority upon any express legislative enactment, but upon usage or custom.[2] Or it may be punished by the statute law, or express legislative enactments.[3] Unless a prohibition can be found in one or the other,

---

[1] Com. v. Marshall, 11 Pick. (Mass.) 350, 22 Am. Dec. 377, Beale's Cas. 5.

[2] Post, § 10 et seq.

[3] Post, § 32 et seq.

no act whatever, however atrocious, is a crime.[4]

Murder, rape, and robbery are most grievous crimes by the common law, and were punished by death, but they would not be crimes at all if the legislature should abolish the common law, as has been done in several states,[5] and inadvertently fail to enact a statute covering such acts, or enact a statute unconstitutionally. In Ohio, the common law was abolished, in so far as it determines what acts are crimes, and the legislature undertook to cover the whole field by statute. It neglected, however, to provide for the punishment of a man who should have carnal knowledge of a girl under 10 years of age with her consent, and when such an act was committed in that state some years ago, the court had to hold that it was not a crime, and could not be punished.[6]

9. Repeal of Law after Commission of Act.

As will be shown in a subsequent section,

---

[4] Com. v. Marshall, supra; Rust v. State, 4 Ind. 528; Smith v. State, 12 Ohio St. 466, 80 Am. Dec. 355; Com. v. Grover, 16 Gray (Mass.) 602.

[5] Post, § 14.

[6] Smith v. State, 12 Ohio St. 466, 80 Am. Dec.

an act committed while a law is in force prohibiting and punishing it cannot be made the subject of a criminal prosecution after the law has been repealed without a saving clause as to acts previously committed. The law must be in force when proceedings are taken to punish for the act, as well as when the act is committed.[7]

II. THE COMMON LAW.

10. Definition.—By the "common law" is meant that portion of the municipal law which does not rest for its authority upon any express act of the legislature, but is founded upon usage and custom. It is called the unwritten law, in contradistinction to the written or statute law.[8]

The common law in the United States consists in the common law of England as it existed at the time the colonists emigrated and settled in America, in so far as that law was applicable to their new conditions and surroundings, and except in so far as it has been abolished by statute. It also includes some English statutes enacted before

---

355. And see Mitchell v. State, 42 Ohio St. 383; Estes v. Carter, 10 Iowa, 400. See, also, post, § 14.

[7] Com. v. Marshall, 11 Pick. (Mass.) 350, 22 Am. Dec. 377, Beale's Cas. 5; Keller v. State, 12 Md. 322, 71 Am. Dec. 596; post, § 52.

[8] 2 Cent. Dict. & Cyc. p. 1133; 2 Johns. Univ. Cyc. 427. "By the common law is meant those maxims, principles, and forms of judicial proceed-

that time, a few of such statutes enacted afterwards, but before the Revolution, and some usages adopted by the colonists.

11. The English Common Law.

The common law of England, otherwise called the "unwritten law,"—the *lex non scripta,*—is based upon the immemorial usage and general consent of the people, and not upon legislative enactment. From the earliest times, certain rules and principles have been recognized there, and applied by the courts from time to time to particular cases, as they have arisen. These rules and principles constitute the common law of England. "The authority of the maxims and rules of the common law," said Blackstone, "rests entirely upon general reception and usage, and the only method of proving that this or that maxim is a rule of the common law is by showing

---

ing which have no written law to prescribe or warrant them, but which, founded on the laws of nature and the dictates of reason, have, by usage and custom, become interwoven with the written laws, and, by such incorporation, form a part of the municipal code of each state or nation which has emerged from the loose and erratic habits of savage government." State v. Lafferty, Tappan (Ohio) 113.

that it hath always been the custom to observe it." [9]

12. The Common Law in the United States.

(*a*) *Offenses against the States.*—The common law in the United States consists, for the most part, of the common law of England, except in so far as it has been abolished by statute; but it also includes other laws. When our ancestors emigrated from England, they brought with them the common law as it then existed, except such parts as were inapplicable to their new state and condition. This became the common or unwritten law of the colonies settled by the English, and continued to be a part of their common law when they became states. It is still the common law in the various states, except in so far as it has been abolished or superseded by statute.[10] In

---

[9] 1 Bl. Comm. 68. See 6 Am. & Eng. Enc. Law (2d Ed.) 270, 271.

[10] Com. v. Knowlton, 2 Mass. 530, Beale's Cas. 1; Com. v. Chapman, 13 Metc. (Mass.) 68. And see Com. v. York, 9 Metc. (Mass.) 93, 110; Com. v. Callaghan, 2 Va. Cas. 460, Beale's Cas. 116; Anderson v. Com. 5 Rand. (Va.) 627, 16 Am. Dec. 776; Com. v. Sharpless, 2 Serg. & R. (Pa.) 91, Beale's Cas. 113; State v. Rollins, 8 N. H. 550, 559; State v. Danforth, 3 Conn. 112, 114; State v.

Massachusetts and some of the other states it

Lafferty, Tappan (Ohio) 113; Smith v. People, 25 Ill. 17, 76 Am. Dec. 780; Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569, Beale's Cas. 128; State v. Cawood, 2 Stew. (Ala.) 360; Pierson v. State, 12 Ala. 149; Porter v. State, Mart. & Yerg. (Tenn.) 226; Fields v. State, 1 Yerg. (Tenn.) 156; Simpson v. State, 5 Yerg. (Tenn.) 356; State v. Twogood, 7 Iowa, 252; State v. Buchanan, 5 Har. & J. (Md.) 317, 333, 9 Am. Dec. 534.

In Com. v. Chapman, 13 Metc. (Mass.) 68, 69, Chief Justice Shaw said: "To a very great extent, the unwritten law constitutes the basis of our jurisprudence, and furnishes the rules by which public and private rights are established and secured, the social relations of all persons regulated, their rights, duties, and obligations determined, and all violations of duty redressed and punished. Without its aid, the written law, embracing the constitution and statute laws, would constitute but a lame, partial, and impracticable system. Even in many cases where statutes have been made in respect to particular subjects, they could not be carried into effect, and must remain a dead letter, without the aid of the common law. In cases of murder and manslaughter, the statute declares the punishment; but what acts shall constitute murder, what manslaughter, or what justifiable or excusable homicide, are left to be decided by the rules and principles of the common law. So, if an act is made criminal, but no mode of prosecution is directed, or no punishment provided, the common law furnishes its ready aid, prescribing the mode of

was expressly recognized and adopted by the constitution or by statute.[11]

Our English ancestors also brought with them such of the English statutes as had been enacted and were in force at the time of their emigration, and were applicable to their new condition, and these also became a part of their common law, without being re-enacted.[12] Other English statutes, enacted after their emigration, and before the Revolution, in amendment or modification of the common law, were adopted in the colonies by general

---

prosecution by indictment, the common-law punishment of fine and imprisonment. Indeed, it seems to be too obvious to require argument, that without the common law, our legislation and jurisprudence would be impotent, and wholly deficient in completeness and symmetry, as a system of municipal law."

[11] See Com. v. Chapman, 13 Metc. (Mass.) 68; Com. v. Churchill, 2 Metc. (Mass.) 118, Beale's Cas. 6; Com. v. York, 9 Metc. (Mass.) 93, 110; Stuart v. People, 4 Ill. 395, 404; State v. Cawood, 2 Stew. (Ala.) 360.

[12] Com. v. Chapman, supra; Com. v. Knowlton, 2 Mass. 530, Beale's Cas. 1; State v. Moore, 26 N. H. 448, 455, 59 Am. Dec. 354; State v. Rollins, 8 N. H. 550, 559.

consent, and thus became a part of their common law.[13]

In addition to these sources of our common law, some usages growing out of the peculiar situation and exigencies of the colonists were adopted by general consent.[14]

No part of the common law of England was adopted or is in force in this country that is inapplicable to our state and condition: and as the condition of the people may vary in the different states, what is recognized as common law in one state may not be so recognized in another.[15]

Louisiana and Texas, having been settled respectively by the French and Spanish, were originally subject to the civil law, but the common law as to crimes and criminal prose-

---

[13] Com. v. Chapman, supra; Com. v. Knowlton, supra.

Generally, however, statutes passed in England after emigration did not become a part of our common law. Com. v. Lodge, 2 Grat. (Va.) 580.

[14] Com. v. Chapman, supra; Com. v. Knowlton, supra.

[15] People v. Randolph, 2 Park. Cr. R. (N. Y.) 174; Williams v. State, 14 Ohio, 222 45 Am. Dec. 536; Stuart v. People, 4 Ill. 395, 404; Simpson v. State, 5 Yerg. (Tenn.) 356.

cutions has been adopted by statute in both states to some extent.[16]

(*b*) *Offenses against the United States.*—The federal courts cannot exercise common-

---

[16] See State v. McCoy, 8 Rob. (La.) 545, 41 Am. Dec. 301; Grinder v. State, 2 Tex. 339.

In Louisiana, the act of 1805, for the punishment of crimes, defined many offenses, but, in the case of a number of the more familiar crimes, such as murder, rape, robbery, etc., simply described them by name, without further definition; and section 33 of the act provided that the crimes "hereinbefore named" should be "taken, intended, and construed according to the common law of England." The present statute leaves out the words first quoted, and declares: "All crimes, offenses, and misdemeanors shall be taken, intended, and construed according to and in conformity with the common law of England," etc. It has been held that this does not adopt the common law, so as to punish in Louisiana all the crimes known to the common law, but merely adopted the common-law definitions of those offenses declared to be crimes by the act of 1805. State v. Smith, 30 La. Ann. 846; State v. Depass, 31 La. Ann. 487; State v. Gaster, 45 La. Ann. 636. Except to this extent, there can be no crime in Louisiana which is not defined and denounced by statute. Except as to the crimes denounced by name in the act of 1805, and which are to be taken according to the common-law definitions, the legislature must define crimes. State v. Gaster, 45 La. Ann. 636.

law jurisdiction in criminal cases. Under the constitution of the United States, they can exercise such power only as is conferred upon them by congress. Therefore, before any act can be punished as a crime against the United States, congress must make it a crime, affix a punishment, and declare the court which shall have jurisdiction of the offense.[17] Congress has passed statutes making many acts crimes, and conferring jurisdiction of them upon the federal courts. In many instances it has merely designated the offenses by their common-law name, as "murder," "manslaughter," "robbery," etc. In such cases we must look to the common law for the definition of the offense.[18] The offense, however, is purely a statutory one.

(*c*) *Offenses in the District of Columbia.*—The common law of Maryland, as it existed at the time the territory embraced in the Dis-

[17] This was settled in 1812 in U. S. v. Hudson, 7 Cranch (U. S.) 32, Beale's Cas. 3; and it was held in that case that for this reason the circuit court of the United States for the district of Connecticut could not take jurisdiction of an indictment for a libel on the president and congress. See, also, U. S. v. Eaton, 144 U. S. 677.

[18] In re Greene, 52 Fed. 104; U. S. v. Coppersmith, 4 Fed. 198.

trict of Columbia was ceded by that state to the United States, and the statutes in force at that time, continued in force in the District when it was created by congress, and are now in force there except in so far as they have been changed by act of congress.[19]

13. How the Common Law is Evidenced and Determined.

For the most part, the common law is in fact unwritten law,—usage and tradition,—but there is abundant evidence of it in the reports of decisions, and in the writings of recognized authorities, like Coke, Hale, Hawkins, Foster, East, and others. The judges determine from such sources what the law is. What this law is, said Blackstone, is to be determined "by the judges in the several courts of justice. They are the depositaries of the laws, the living oracles, who must decide in all cases of doubt, and who are bound by oath to decide according to the law of the land. The knowledge of that law is derived from experience and study, * * * and from being

[19] Pollard v. Lyon, 91 U. S. 225, 238; U. S. v. Simms, 1 Cranch (U. S.) 252; Kendall v. U. S., 12 Pet. (U. S.) 613; State v. Cummings, 33 Conn. 260, 89 Am. Dec. 208.

long personally accustomed to the judicial decisions of their predecessors." [20] "In coming to such decision," said Chief Justice Shaw, "judges are bound to resort to the best sources of instruction, such as the records of courts of justice, well-authenticated histories of trials, and books of reports, digests, and brief statements of such decisions, prepared by suitable persons, and the treatises of sages of the profession, whose works have an established reputation for correctness." [21]

In other words, it is the duty of the courts to determine what the established rules and customs of the common law are, and then to apply them to the facts of the particular case that may be before them for decision. It is not necessary that they shall be able to point to a decided case exactly similar in its facts. It is sufficient if the facts bring the case within established principles. "Acts deemed to be injurious to the public have, in some instances, been held to be misdemeanors, because it appeared to the court, before which

[20] 1 Bl. Comm. 69.

[21] Com. v. Chapman, 13 Metc. (Mass.) 68. And see Anderson v. Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776.

they were tried, that there was an analogy between such acts and others which had been held to be misdemeanors, although such first-mentioned acts were not forbidden by any express law, and although no precedent exactly applied to them." [22]

---

[22] Steph. Dig. Crim. Law, art. 160. And see Com. v. York, 9 Metc. (Mass.) 93, 110; Com. v. Callaghan, 2 Va. Cas. 460, 462, Beale's Cas. 116; Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569, Beale's Cas. 128; Com. v. Sharpless, 2 Serg. & R. (Pa.) 91, Beale's Cas. 113; State v. Buchanan, 5 Har. & J. (Md.) 317, 333.

"It is impossible to find precedents for all offenses. The malicious ingenuity of mankind is constantly producing new inventions in the art of disturbing their neighbors. To this invention must be opposed general principles, calculated to meet and punish them." Com. v. Taylor, 5 Binn. (Pa.) 277.

In the introduction to Stephen's Digest of the Criminal Law (page VIII.) it is said: "It is not till a very late stage in its history that law is regarded as a series of commands issued by the sovereign power of the state. Indeed, even in our own time and country, that conception of it is gaining ground very slowly. An earlier, and, to some extent, a still prevailing, view of it is that it is more like an art or science, the principles of which are at first enunciated vaguely, and are gradually reduced to precision by their application to particular circumstances. Some-

14. Abolition of the Common Law.

In some states, the common law, in so far as it punishes offenses, has been altogether abolished, while in all states it has been to some extent abrogated or superseded by statute. The question, what constitutes an implied repeal of the common law, will be considered in another section.[23]

In Ohio, no act, however atrocious,—even sodomy,— can be punished criminally except in pursuance of a statute.[24]

---

how, no one can say precisely how, * * * certain principles came to be accepted as the law of the land. The judges held themselves bound to decide the cases which came before them according to those principles, and, as new combinations of circumstances threw light on the way in which they operated, the principles were, in some cases, more and more fully developed and qualified, and, in others, evaded or practically set at naught and repealed. Thus, in order to ascertain what the principle is at any given moment, it is necessary to compare together a number of decided cases, and to deduce from them the principles which they establish."

[23] Post, § 51.

[24] State v. Smith, 12 Ohio St. 466, 80 Am. Dec. 355; Mitchell v. State, 42 Ohio St. 383; State v. Lafferty, Tappan (Ohio) 113, to the contrary, is overruled. See Mitchell v. State, supra.

In Iowa, the principles of the common law are recognized for the purpose of construing a statute punishing a crime, and merely describing it by a name known to the common law, as murder, robbery, assault and battery, etc.,[25] but no act is punishable as a crime unless it is made so by statute.[26]

In Indiana, it is expressly declared by statute that crimes and misdemeanors "shall be defined," and "the punishment therefor fixed," by statute, and not otherwise. No act is a crime unless it is made so by statute.[27] But it has been held that this provision does not prevent the legislature, in punishing an act which was an offense at common law, from describing it by merely giving its common-law name. The common law may then be looked to in order to ascertain what acts are necessary to constitute the crime.[28]

In Texas it was formerly provided that no person should be punished for any act or omission, as a penal offense, unless the same

---

[25] State v. Twogood, 7 Iowa, 252.

[26] Estes v. Carter, 10 Iowa, 400.

[27] Stephens v. State, 107 Ind. 185; Jones v. State, 59 Ind. 229.

[28] Ledgerwood v. State, 134 Ind. 81; State v. Berdetta, 73 Ind. 185, 38 Am. Rep. 117.

should be "expressly defined" by statute,[29] and it was held necessary, not only to declare an act punishable by statute, but also to expressly define the offense. To prescribe a punishment for an offense without defining it further than by giving it a common-law name was not enough.[30] The present statute is different. It provides that no person shall be punished for any act or omission unless the same "is made a penal offense," and a penalty is affixed by statute.[31] Under this provision it is no longer necessary that offenses shall be defined further than by using a name known to the common law.[32]

In Louisiana, with some exceptions, no act is a crime unless defined by statute.[33]

In most states, the common law, in so far as it punishes crimes, has not been altogether abolished. It has been to some extent repealed or superseded by statute,[34] but where

---

[29] Pasch. Dig. art. 1605.

[30] State v. Foster, 31 Tex. 578; Wolff v. State, 6 Tex. App. 195.

[31] Pen. Code, art. 3.

[32] Ex parte Bergen, 14 Tex. App. 52; Prindle v. State, 31 Tex. Cr. R. 551, 37 Am. St. Rep. 833.

[33] Ante, § 12, note 16.

[34] Post, §§ 12, 14, 51.

there has been no express repeal, an act which was an offense at common law, and which is not covered by any statute, may still be punished as a common-law crime.[35]

15. Acts and Omissions Prohibited and Punished at Common Law—In General.

It may be laid down, as a general rule of the common law, that any act, or any omission of a legal duty, that injures or tends to injure the community at large to such an extent that public policy requires the state to interfere and punish the wrongdoer is a crime, and renders the wrongdoer liable to indictment.[36] But an act which injures a sin-

---

[35] See State v. Pulle, 12 Minn. 164 (overruling the dictum to the contrary in Benson v. State, 5 Minn. 19); Smith v. People, 25 Ill. 17, 76 Am. Dec. 780, Beale's Cas. 811; People v. Crowley, 23 Hun (N. Y.) 412; Com. v. McHale, 97 Pa. St. 397, 39 Am. Rep. 808; post, § 51.

[36] In the case of Com. v. McHale, 97 Pa. St. 397, 39 Am. Rep. 808, where fraud in an election of public officers was held a misdemeanor at common law, it was said: "We are of opinion that all such crimes (acts) as especially affect the public society are indictable at common law. The test is not whether precedents can be found in the books, but whether they injuriously affect the public policy and economy." See, also, Walsh

gle individual only, or a few individuals, and does not injure or threaten the other members of the community to such an extent as to require interference and punishment by the state, is a mere private wrong, and must be left to be redressed in a civil action by the party or parties injured.[37] This principle has been applied by the courts again and again to the facts of particular cases, and in this way narrower and more definite rules have become established. These rules are sufficient to cover almost any fact or combination

---

v. People, 65 Ill. 58, 16 Am. Rep. 569, Beale's Cas. 128.

"Whatever acts are wicked and immoral in themselves, and directly tend to injure the community, are crimes against the community, which not only may, but must, be repressed and punished, or government and social order cannot be preserved. It is this salutary principle of the common law which spreads its shield over society, to protect it from the incessant activity and novel inventions of the profligate and unprincipled,—inventions which the most perfect legislation could not always see and guard against." State v. Lafferty, Tappan (Ohio) 113.

[37] Rex v. Wheatly, 2 Burrows, 1125, 1 W. Bl. 273, Beale's Cas. 97; Kilpatrick v. People, 5 Denio (N. Y.) 277; Com. v. Webb, 6 Rand. (Va.) 726.

of facts, and therefore it is seldom necessary to apply the broader principle. Illustrations of its application, and the narrower principles that have sprung from it, will appear in the following sections.

16. Frauds in General.

If a man fraudulently takes and carries away another's goods without his consent, with intent to steal them, he is guilty of larceny at common law,—a felony;[38] and if a man defrauds another of his money or property by the use of false weights, measures, or tokens of a public nature, against which common prudence cannot guard, he is guilty of a cheat and misdemeanor at common law;[39] and if he joins another in a conspiracy to defraud, he is guilty of a misdemeanor.[40] It was considered by the common law that ordinary care and prudence could not guard against these acts, and that the whole community was threatened to such an extent that the state should interfere for its protection,

---

[38] Post, § 303 et seq.

[39] Reg. v. Mackarty, 2 Ld. Raym. 1179; post, § 350 et seq.

[40] Reg. v. Mackarty, supra; Com. v. Warren, 6 Mass. 74; post, § 144.

and therefore these frauds were held to be crimes. They have been so regarded from the earliest times.

On the other hand, the common law considered that common prudence could sufficiently guard against cheating by mere false representations or lies, without the use of false measures, weights, or tokens, and without conspiracy, and such cheats were held not to be crimes, but mere private wrongs. Such is the case at common law when a man sells an unsound horse on a false and fraudulent representation that it is sound, or sells and agrees to deliver a certain quantity of liquor, and fraudulently delivers a less quantity as and for the quantity agreed upon, using no false measures.[41] The same is true of fraud-

[41] Rex v. Wheatly, 2 Burrows, 1125, 1 W. Bl. 273, Beale's Cas. 97; Com. v. Warren, 6 Mass. 74; People v. Garnett, 35 Cal. 470, 95 Am. Dec. 125; People v. Miller, 14 Johns. (N. Y.) 371; People v. Babcock, 7 Johns. (N. Y.) 201; Middleton v. State, Dudley (S. C.) 275; post, § 351.

In a case involving the facts last mentioned in the text, Lord Mansfield said: "That the fact here charged should not be considered as an indictable offense, but left to a civil remedy by an action, is reasonable and right, in the nature of the thing, because it is only an inconvenie-

ulent breach of trust and confidence, as in cases of embezzlement. This is not a crime at common law.[42]

Fraud in an election of public officers directly affects the public at large, and is a misdemeanor at common law.[43]

17. Trespasses in General.

If a trespass does not injure or threaten to injure the public to such an extent that public policy requires the state to interfere, it is a mere private wrong, and not a crime. For this reason it has been held that it is not a crime to break the windows of a house, though it be done willfully and maliciously, if it be not done at night, nor in a secret manner, nor in such a way as to disturb the public peace.[44] The same is true of a bare trespass

---

and injury to a private person, arising from that private person's own negligence and carelessness in not measuring the liquor, upon receiving it, to see whether it held out the just measure or not. The offense that is indictable must be such a one as affects the public." Rex v. Wheatly, supra. See post, § 351.

[42] Post, § 341, et seq.

[43] Com. v. McHale, 97 Pa. St. 397, 39 Am. Rep. 808; post, § 444.

[44] Kilpatrick v. People, 5 Denio (N. Y.) 277; post, § 418.

upon land or goods, not accompanied by actual force or threatened violence, so as to amount to a breach of the peace.[45]

It is otherwise, however, when a trespass is committed under such circumstances as to threaten or injure the whole community. Murder, manslaughter, rape, robbery, burglary, and arson are all trespasses against the person or property, and they are all felonies at common law.[46] It is clear that, if such acts are not punished by the state, the security of the whole community is affected; and so it is of many less grevious trespasses. Any trespass that constitutes a breach of the public peace and order, or that threatens a breach of the public peace and order, is a crime at common law. Thus it is a misdemeanor at common law to commit a trespass on real property, if it is committed under such circumstances as to constitute or cause a breach of the peace.[47] And it has been held a misde-

[45] Rex v. Storr, 3 Burrows, 1698; Rex v. Blake, 3 Burrows, 1731; Com. v. Edwards, 1 Ashm. (Pa.) 46; post, § 418.

[46] See these specific crimes, post, §§ 197 et seq., 303 et seq., 400 et seq.

[47] Com. v. Taylor, 5 Binn. (Pa.) 277; Rex v. Hood, Sayer, 161; post, § 418.

meanor, and not merely a private wrong, to destroy another's property maliciously, and in a secret manner,[48] or to maliciously and wantonly kill or maim a domestic animal,[49] for these acts have a direct tendency to provoke violent retaliation, and therefore to cause breaches of the peace.[50]

18. Nuisances in General.

The same distinction exists as to nuisances. A nuisance which affects the health or comfort of a particular individual only, or of a few individuals, is a mere private nuisance, to be redressed or abated by a civil action;[51] but if it affects the health or comfort of the entire neighborhood, or the passers-by on a public highway, it is a common or public nuisance, and a crime.[52] Thus, it is a misdemeanor at common law to sell unwholesome pro-

---

[48] Loomis v. Edgerton, 19 Wend. (N. Y.) 419; post, § 418.

[49] Respublica v. Teischer, 1 Dall. (Pa.) 335; People v. Smith, 5 Cow. (N. Y.) 258; State v. Briggs, 1 Aik. (Vt.) 226; post, § 388.

[50] As to breaches of the peace, see post, § 417 et seq.

[51] Com. v. Webb, 6 Rand. (Va.) 726; post, § 445 et seq.

[52] Rex v. Burnett, 4 Maule & S. 272; post, § 445 et seq.

visions,[53] or to obstruct a public street or highway by collecting a crowd, or otherwise.[54] Many other illustrations of the distinction will be found in a subsequent chapter.[55]

19. Particular Crimes and Their Classification—In General.

The particular crimes prohibited and punished at common law, as well as the more important statutory crimes, will be treated and explained in subsequent chapters. It is proposed to show here only in a general way what crimes were punished by the common law. Following in a general way, though with some change, Blackstone's arrangement, common-law crimes, including both felonies and misdemeanors, may be classified as follows:

1. Offenses especially affecting individuals, among which are included (1) offenses against the persons of individuals, (2) offenses against their property, and (3) offenses against their habitations.

2. Offenses especially affecting the commonwealth, among which are included (1) offenses against public justice, (2) offenses

---

[53] State v. Lafferty, Tappan (Ohio) 113.

[54] Barker v. Com., 19 Pa. St. 412.

[55] Post, §§ 445-456.

against the public peace, (3) offenses against the public trade, (4) offenses against the public health and comfort, and (5) offenses against the public morals and sense of decency.

3. Offenses especially affecting the king, or the state, and the government, the most important of which is treason.

4. Offenses more immediately offending God and religion, among which Blackstone included (1) apostacy, (2) heresy, (3) offenses against the established church, (4) blasphemy, (5) profane swearing and cursing, (6) witchcraft, (7) religious impostures, (8) simony, (9) Sabbath breaking, (10) drunkenness, and (11) lewdness.

5. Offenses against the law of nations, among which are (1) violation of safe conducts, (2) infringement of the rights of ambassadors, and (3) piracy.

20. Offenses against the Persons of Individuals.

The following offenses, called offenses against the person, because they especially affect the persons of particular individuals, are either felonies or misdemeanors at common law:

1. *Murder,* or the killing of a human being with malice aforethought,[56] is a felony.

2. *Manslaughter,* or the killing of a human being without malice aforethought, but without justification or excuse,[57] is also a felony.

3. *Mayhem,* or the depriving another of the use of such of his members as may render him the less able, in fighting, either to defend himself, or to annoy his adversary,[58] is either a felony or a misdemeanor. As to which, there is some doubt.

4. *Abortion,* or unlawfully causing the premature delivery of a child after it has quickened, so that it is born dead,[59] is a misdemeanor.

5. *Rape,* or unlawful carnal knowledge of a woman by force, and against her will,[60] is a felony.

6. *Sodomy,* or buggery, the crime against nature,[61] is also a felony.

7. *Assault and battery.*—An assault is a mere offer or attempt to inflict corporal in-

---

[56] 4 Bl. Comm. 195; post, § 238 et seq.
[57] 4 Bl. Comm. 191; post, § 255 et seq.
[58] 4 Bl. Comm. 205; post. § 221 et seq.
[59] Post, § 289 et seq.
[60] 4 Bl. Comm. 210; post, § 293 et seq.
[61] 4 Bl. Comm. 215; post, § 461.

jury upon another, accompanied by circumstances which indicate an intent, coupled with apparent present ability, to do actual violence. If injury is actually inflicted, there is a battery,—both assault and battery.[62] Assault with intent to kill, or to rape, or to rob, etc., are called aggravated assaults, and are punished more severely than simple assault.[63] Assaults and assault and battery are misdemeanors at common law.

8. *False imprisonment,* or unlawfully depriving another of his personal liberty,[64] is a common-law misdemeanor.

9. *Kidnapping,* or the forcible abduction or stealing away of a man, woman, or child from their own country, and sending them into another,[65] is a misdemeanor.

The above are the offenses against the persons of individuals which were known to the common law. They are still offenses, except in so far as the common law has been abrogated or superseded by statute. There are other offenses against the person which have

---

[62] See 4 Bl. Comm. 216; post, § 197.

[63] Post, § 207.

[64] 4 Bl. Comm. 218; post, § 224.

[65] 4 Bl. Comm. 219; post, § 228.

been created by statute, both in England and in this country, and to which attention will be called in another chapter.

21. Offenses against the Property of Individuals.

The following offenses against the property of individuals are punished by the common law. Some are felonies, while others are merely misdemeanors. They are classed as offenses against property, because they immediately affect the property of particular individuals.

1. *Larceny.*—This offense may be defined generally as the taking and carrying away of the mere personal goods of another, *animo furandi,* or with intent to steal.[66] It was a felony at common law, and is still punished as a felony in all jurisdictions.

2. *Cheats.*—It is a misdemeanor at common law, known as "cheating," for a person to fraudulently obtain the property of another by a deceitful practice, not amounting to a felony (larceny), which directly affects, or may affect, the public at large. But it is not cheating at common law to deceive any person

[66] 4 Bl. Comm. 229; post, § 303 et seq.

in any contract or private dealing by lies, unaccompanied by such practices.[67]

3. *Malicious mischief.*—At common law, it is a misdemeanor, known as "malicious mischief," to willfully and maliciously destroy or injure the property of another, under certain circumstances. This offense is now covered by various statutes in England and in this country. It is included here, as by Blackstone, among offenses against property. At common law, however, it was punished, not merely because of the injury to the property, but because of the tendency to provoke violent retaliation, and cause a breach of the public peace, and was therefore more properly an offense against the public peace.[68]

4. *Robbery* is a felony at common law. It is a compound larceny,—the taking of the property of another from his person, *animo furandi,* by violence, or by putting him in fear.[69]

5. *Receiving stolen goods* with knowledge

---

[67] Steph. Dig. Crim. Law, art. 338; post, §§ 350-369. Cheating was classed by Blackstone as an offense against public trade.

[68] See 4 Bl. Comm. 243; post, § 388.

[69] 4 Bl. Comm. 241; post, § 370.

that they have been stolen, and with intent to defraud, is a misdemeanor at common law.[70]

6. *Forgery* is a misdemeanor at common law. It is the false making, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability.[71]

As we shall see in a subsequent chapter, statutes have been enacted in all jurisdictions creating many new offenses against property.

22. Offenses against the Habitations of Individuals.

The only common-law offenses which more immediately affect the habitations of individuals, and which are therefore classed as offenses against the habitation, rather than as offenses against property, are burglary and arson. These are both felonies at common law.

1. *Burglary* is the breaking and entering of the dwelling house of another in the nighttime, with intent to commit a felony.[72]

---

[70] 4 Bl. Comm. 132; post, § 380. This is included by Blackstone among offenses against public justice.

[71] Post, § 392; 4 Bl. Comm. 247.

[72] 4 Bl. Comm. 223; post, § 400.

2. *Arson* is the willful and malicious burning of the dwelling house of another.[73]

These offenses, as we shall see when we come to treat of them, have been very much enlarged by statute in all jurisdictions.

23. Offenses Especially Affecting the Commonwealth and the Government—In General.

In one sense, all offenses affect the commonwealth or government. It is only upon this theory that any act is punished by the state. There are some offenses, however, which especially affect the commonwealth,—that is, the whole community,—rather than any one individual, as (1) offenses affecting the administration of public justice, (2) offenses affecting the public peace, (3) offenses affecting the public trade, (4) offenses affecting the public health and comfort, (5) offenses affecting the public morals or sense of decency, and (6) offenses directly affecting the administration of government.[74]

24. Offenses Affecting the Administration of Justice.

The public is clearly injured by acts cor-

---

[73] 4 Bl. Comm. 221; post, § 410.

[74] See 4 Bl. Comm. 127 et seq; Steph. Dig. Crim. Law, 36 et seq.

rupting or obstructing the administration of public justice, and therefore the common law punishes as a misdemeanor any willful and corrupt act having this effect or tendency. For this reason, it punishes the compounding of felonies, or agreements not to prosecute therefor, bribery of judicial officers, bribery of jurors, or otherwise tampering with them, champerty and maintenance, perjury, obstruction of officers in the service of process, etc.[75]

25. Offenses Affecting the Public Peace.

At common law, any act which in itself amounts to a disturbance of the public peace, or which has a direct tendency to cause a breach of the public peace, is a misdemeanor.[76] For this reason, among others, the common law punishes unlawful assemblies, routs,

---

[75] 4 Bl. Comm. 127 et seq; Reg. v. Burgess, 16 Q. B. Div. 141; Slomer v. People, 25 Ill. 70, 76 Am. Dec. 786; State v. McNally, 34 Me. 210, 56 Am. Dec. 650; State v. De Witt, 2 Hill (S. C.) 282, 27 Am. Dec. 371; State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450; post, §§ 430-444.

[76] 4 Bl. Comm. 142 et seq.; Henderson v. Com., 8 Grat. (Va.) 708, 56 Am. Dec. 160; State v. Burnham, 56 Vt. 445, 48 Am. Rep. 801; State v. Jasper, 4 Dev. (N. C.) 323; State v. Huntly, 3 Ired. (N. C.) 418, 40 Am. Dec. 416.

riots, affrays, disturbance of public assemblies, prize fighting, etc.;[77] and because of the tendency to cause breaches of the peace, it punishes various acts of malicious mischief,[78] libel,[79] certain kinds of disorderly houses,[80] etc. The principle is not limited to these specific offenses, but covers any other case in which the public peace is disturbed.[81]

26. Offenses Affecting the Public Trade.

Among the common-law offenses affecting the public trade, the first mentioned by Blackstone is owling,[82] or the transporting of wool

---

[77] Com. v. Hoxey, 16 Mass. 385; State v. Perry, 5 Jones (N. C.) 9, 69 Am. Dec. 768. And see these specific crimes, post, §§ 417-429.

[78] Respublica v. Teischer, 1 Dall. (Pa.) 335; People v. Smith, 5 Cow. (N. Y.) 258; State v. Briggs, 1 Aik. (Vt.) 226; post, § 388.

[79] Com. v. Chapman, 13 Metc. (Mass.) 68; post, § 428.

[80] State v. Buckley, 5 Harr. (Del.) 508; State v. Bertheol, 6 Blackf. (Ind.) 474, 39 Am. Dec. 442; post, § 427.

[81] Thus it has been held a misdemeanor at common law to agree to fight. State v. Hitchens, 2 Harr. (Del.) 527. For other illustrations, see State v. Huntly, 3 Ired. (N. C.) 418; U. S. v. Hart, Pet. C. C. 390, Fed. Cas. No. 15,316, and the cases cited post, §§ 417-429.

[82] So called because it was usually carried on at night. 4 Bl. Comm. 154.

or sheep out of the kingdom, to the detriment of its staple manufacture.[83] Smuggling, or the importing of goods without paying the duties imposed by law, was punished by various early English statutes.[84] Fraudulent bankruptcy and usury were punished by early English statutes, and are classed by Blackstone as offenses affecting the public trade.[85] In this country they are punished by statute in some jurisdictions. Cheating was also classed as an offense against public trade.[86] Forestalling the market, regrating, engrossing, monopolies, exercising a trade without having served an apprenticeship, were all offenses against the public trade, either at common law, or by virtue of early English statutes.[87]

27. Offenses Affecting the Public Health and Comfort.

Any act injuriously affecting or endangering the health or comfort of the community at large was and still is a com-

[83] 4 Bl. Comm. 154. It was also punished particularly by the statute of 2 Edw. III. c. 1; but it has been since abolished.

[84] 4 Bl. Comm. 154, 155.

[85] 4 Bl. Comm. 156.

[86] See ante, § 21; post, § 350.

[87] 4 Bl. Comm. 158; post, §§ 474-481.

mon nuisance, and a misdemeanor at common law. Thus, it is a misdemeanor to expose a person having a contagious disease in such a way that other members of the community may be infected, to sell unwholesome provisions, to conduct a dangerous or noxious business in such a way, or at such a place, as to endanger the life or health of the other members of the community, or, subject to limitations, so as to interfere with the comfort of the other members of the community.[88]

28. Offenses Affecting the Public Morals or Sense of Decency.

"Immorality" and "crime" are by no means convertible terms. The law does not undertake to punish a man merely because he is immoral. There must be something more. There must be injury to the community at large. A man may be grossly immoral in his private life, without being responsible to the criminal law, unless his conduct is covered by some statute.[89] Public immorality, however, because of the tendency to corrupt the

---

[88] 4 Bl. Comm. 161 et seq.; Anon., 12 Mod. 342, Beale's Cas. 843; Rex v. Burnett, 4 Maule & S. 272, Beale's Cas. 104; post, § 445 et seq.

[89] Anderson v. Com., 5 Rand (Va.) 627, 16 Am. Dec. 776, where it was held in effect that fornica-

public morals, and shock the public sense of decency, is a public nuisance, and a misdemeanor at common law. It may therefore be laid down as a general principle, that, at common law, any act that has a direct tendency to corrupt the morals of the community, or shock its sense of decency, is a misdemeanor. For this reason, the common law punishes the keeping of a common bawdy house, or house that is a common resort for the purpose of prostitution, a common gaming house, indecent exposure of the person in a public place, obscene publications and exhibitions, open and notorious lewdness, etc.[90]

---

tion, adultery, and seduction are not common-law crimes.

[90] Rex v. Delaval, 3 Burrows, 1434, Beale's Cas. 101; Rex v. Curl, 2 Strange, 788; Com. v. Sharpless, 2 Serg. & R. (Pa.) 91, 7 Am. Dec. 632, Beale's Cas. 113; Kanavan's Case, 1 Me. 226, Beale's Cas. 115; Britain v. State, 3 Humph. (Tenn.) 203; State v. Appling, 25 Mo. 315, 69 Am. Dec. 469; Barker v. Com., 19 Pa. St. 412. And see post, § 458 et seq.

In Barker v. Com., supra, it was held that foul language charged to have been uttered in the public streets with intent "to debauch, debase, and corrupt the morals of youth, as well as others," and to their "manifest corruption and subversion," was indictable at common law.

29. Offenses Affecting the Administration of the Government.

A number of offenses which cannot strictly be classed as offenses against the administration of justice, but which are very similar, and are governed by the same principles, may be designated as offenses against the administration of the government. Misconduct on the part of a public officer, if accompanied by fraud or corruption, is clearly a misdemeanor at common law.[91] He may be guilty of a misdemeanor, even without fraud or corruption.[92] Private citizens may also be punished at common law for acts preventing or obstructing the administration of the government, as for illegally voting at an election.[93]

30. Offenses against God and Religion.

Blackstone mentions a number of offenses which he classes as offenses against God and

---

[91] Trial of Jones, 31 How. St. Tr. 251; Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569, Beale's Cas. 128; post, § 434.

[92] Com. v. Callaghan, 2 Va. Cas. 460, Beale's Cas. 116; Com. v. Alexander, 4 Hen. & M. (Va.) 522; post, § 434.

[93] Com. v. Silsbee, 9 Mass. 417, Beale's Cas. 111; post, § 444.

His holy religion, and which were punishable in England. These have been mentioned in another place.[94] In this country, we have no offenses which can be called offenses against God and religion. Neither the United States nor the states undertake to interfere with a citizen's religious belief or religious practices, so long as his acts do not affect the other members of the community, so as to become common nuisances, or otherwise criminal.[95]

31. Offenses against the Law of Nations.

The law of nations "is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world, in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each." [96] The law of nations is a part of the common law.[97] The offenses

---

[94] 4 Bl. Comm. 42; ante. § 19.
[95] Post. § 457.
[96] 4 Bl. Comm. 66.
[97] 4 Bl. Comm. 67.

against the law of nations noticed by the common law were (1) violation of safe conducts, (2) infringements of the rights of ambassadors, and (3) piracy, or robbery and depredation upon the high seas.[98]

III. THE STATUTE LAW.

32. In General.—The statute law, as distinguished from the common or unwritten law, is the law expressly promulgated by the law-making power,—in England, by parliament; in the United States, by congress for the federal government and for the District of Columbia, by the legislatures or general assemblies for the states, and by congress and the territorial legislatures for the territories.

The power of the English parliament to punish acts as crimes is absolute.

The power of congress is such only as is conferred upon it, expressly or impliedly, by the constitution of the United States.

The power of the state legislatures or general assemblies is absolute, except in so far as it is limited by the constitution of the United States, or of the state.

The power of a territorial legislature is such only as is conferred upon it by the organic act of the territory,—the act of congress by which the territory is created,—and acts supplemental thereto.

The Reason and Object of Statutes.—Both in England and in the United States, notwith-

[98] 4 Bl. Comm. 68-73; post, §§ 482-485.

standing the common law, statutes have been enacted from time to time punishing particular acts as crimes. There are various reasons for their enactment. Some statutes have been enacted to remedy or supply what was considered to be a defect in the common law, by punishing an act which was not regarded as a crime at common law, but which experience has shown to be so hurtful to the public as to require interference and punishment by the state. It was for this reason that statutes were enacted to punish embezzlement, and the obtaining of money or property by false pretenses, neither of which were regarded as crimes at common law.[99] For the same reason, statutes have been enacted to punish as burglary or arson the breaking and entering, or the burning, of other houses and things than dwelling houses and out houses within the curtilage or common inclosure, which were the only subjects of burglary and arson at common law.[100]

Other statutes have been enacted to remove doubt and uncertainty as to what was

---

[99] See Rex v. Wheatly, 2 Burrows, 1125, 1 W. Bl. 273, Beale's Cas. 5. See ante, § 16; post, §§ 341, 350.

[100] See post, § 400 et seq.

the common law, where the judges differed in opinion. Thus, eminent judges differed in opinion as to whether it was burglary at common law to enter a house with felonious intent, but without any breaking, and to break out, in order to escape. A statute was enacted in England at an early day, and has been followed in some of our states, declaring it to be burglary.[101]

Other statutes have been enacted merely to change the punishment imposed by the common law. Felonies, at common law, were almost invariably punished by death, but this has been very generally changed by statute as to all felonies except murder and rape, and in some states as to these. This was the reason for the statutes dividing murder into different degrees. All murder was punished by death at common law, but, under these statutes, only murder in the first degree—that is, murder with actual malice, or express malice—is so punished.[102]

Construction of Statutes.—It is often important to ascertain the reason for the enactment of a penal statute, because the reason

---

[101] See post, § 404(e).

[102] See post, § 251.

and object of a statute is taken into consideration in construing it.[103]

33. Power of the State Legislatures.

In England there is no written constitution to impose restrictions upon the power of parliament. Its power to punish an act as a crime is absolute, and all the courts have to do is to construe its enactments and enforce them. It is different, however, in this country. The state legislatures, like the English parliament, have inherent power to declare acts criminal, and to punish the wrongdoer, but their power is not unlimited. It is restricted by the constitution of the United States, and by the state constitution, and no penal statute is valid if it is in violation of the provisions of either.[104] Except for these limitations, the power of a state legislature is absolute. It may punish any act which, in its judgment, requires punishment, provided it violates no constitutional restriction, and its enactments must be enforced by the courts.[105] The courts cannot review the dis-

---

[103] See post, § 47(c).

[104] Post, § 36 et seq.

[105] Powell v. Com., 114 Pa. St. 265, 127 U. S. 678; State v. Stephenson, 2 Bailey (S. C.) 334;

cretion of the legislature, or pass upon the

Barker v. People, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322, 326; Com. v. Evans, 132 Mass. 11; Com. v. Bearse, 132 Mass. 542, 42 Am. Rep. 450; State v. Addington, 77 Mo. 110; Com. v. Waite, 11 Allen (Mass.) 264, 87 Am. Dec. 711; State v. Smyth, 14 R. I. 100, 51 Am. Rep. 344; Morgan v. Nolte, 37 Ohio St. 23, 41 Am. Rep. 485. And see post, §§ 36-44.

It is competent for the legislative power to create new offenses, and it may extend common-law definitions of particular offenses, so as to punish acts not embraced in the common-law definitions. See People v. Most, 128 N. Y. 108; Rachels v. State, 51 Ga. 374, 276; State v. Sattley, 131 Mo. 464.

In a late New York case it was said: "The legislative power of the state, which, by the constitution, is vested in the senate and assembly, covers every subject which, in the distribution of the powers of government between the legislative, executive, and judicial departments, belongs, by practice or usage, in England or in this country, to the legislative department, except in so far as such power has been withheld or limited by the constitution itself, and subject, also, to such restrictions upon its exercise as may be found in the constitution of the United States. From this grant of legislative power springs the right of the legislature to enact a criminal code, to define what acts shall constitute a criminal offense, what penalty shall be inflicted upon offenders, and generally to enact all laws which

expediency, wisdom, or propriety of legislative action in matters within its powers.[106]

---

the legislature shall deem expedient for the protection of public and private rights, and the prevention and punishment of public wrongs. The legislature may not declare that to be a crime which in its nature is and must be, under all circumstances, innocent, nor can it, in defining crimes, or in declaring their punishment, take away or impair any inalienable right secured by the constitution. But it may, acting within these limits, make acts criminal which before were innocent, and ordain punishment in future cases where before none could have been inflicted. This, in its nature, is a legislative power, which, by the constitution of the state, is committed to the discretion of the legislative body." Lawton v. Steele, 119 N. Y. 226, 16 Am. St. Rep. 813.

[106] Per Allen, J., in People v. Albertson, 55 N. Y. 50, 54. And see State v. Addington, 77 Mo. 110; People v. Worden Grocer Co. (Mich.) 77 N. W. 315. See, also, post, § 36.

In People v. West, 106 N. Y. 293, 60 Am. Rep. 452, it was said: "It is not a good objection to a statute prohibiting a particular act, and making its commission a public offense, that the prohibited act was, before the statute, lawful or even innocent, and without any element of moral turpitude. It is the province of the legislature to determine, in the interest of the public, what shall be permitted or forbidden, and the statutes contain very many instances of acts prohibited, the criminality of which consists solely in the fact

34. Power of Congress.

The power of congress is very much more restricted than the power of the state legislatures. It has no inherent power, but has such powers only as have been expressly or impliedly conferred upon it by the instrument to which it owes its existence,—the constitution of the United States.[107] The constitution also contains some express limitations upon its powers.[108] Congress has the power to legislate for the territories and for the District of Columbia.[109]

---

that they are prohibited, and not at all in their intrinsic quality. The unnecessary multiplication of mere statutory offenses is undoubtedly an evil, and the general interests are best promoted by allowing the largest practicable liberty of individual action, but nevertheless the justice and wisdom of penal legislation, and its extent within constitutional limits, is a matter resting in the judgment of the legislative branch of the government, with which courts cannot interfere."

[107] Const. U. S. art. 1, §§ 8, 9, and the amendments; U. S. v. Arjona, 120 U. S. 479; U. S. v. Coombs, 12 Pet. (U. S.) 72.

[108] Const. U. S. art. 1, § 9.

[109] Const. U. S. art. 1, § 8; Reynolds v. U. S., 98 U. S. 145, Beale's Cas. 179; Reynolds v. People, 1 Colo. 179.

35. Power of Territorial Legislatures.

The territorial legislatures are created by congress, and have such powers only as are conferred upon them by congress in the act by which they are created,—the organic act, —and by acts of congress supplemental thereto. By act of congress, the legislative power in the territories is vested in a governor and legislative assembly, and "extends to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States." [110]

36. Constitutional Limitations—In General.

The legislature cannot legally enact any law in violation of constitutional limitations. Such a statute is absolutely void.[111] In the following sections we shall consider particular

---

[110] Rev. St. U. S. § 1851. And see Reynolds v. People, 1 Colo. 179; Territory v. Yarberry, 2 N. M. 391.

[111] A statute declaring it a crime to exercise any fundamental right guarantied by the constitution, as the right of suffrage, or the free exercise of religious worship, or which, without any reason, deprives a person of life, liberty, or property, is absolutely void. See Barker v. People, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322, 326; In re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; People v.

provisions of the various constitutions. Before doing so, it is well to understand the leading principles by which the courts are governed in determining whether they are violated.

1. If a statute is clearly unconstitutional, the courts must declare it void, and refuse to enforce it. They have no discretion in such a case.[112]

2. They should pay great respect, however, to the deliberate judgment of the legislature as to the constitutionality of a statute, and no statute should be declared unconstitutional unless its unconstitutionality is clear beyond any reasonable doubt.[113]

3. The courts do not sit in review of the discretion of the legislature in matters which are within its power, nor determine upon the

---

Marx, 99 N. Y. 377, 52 Am. Rep. 34; Northwestern Manfg. Co. v. Wayne Circuit Judge, 58 Mich. 381, 55 Am. Rep. 693. And see the cases hereafter more specifically cited.

[112] In re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; Frorer v. People, 141 Ill. 172; Ex parte Kuback, 85 Cal. 274; People v. Gillson, 109 N. Y. 389; State v. Scougal, 3 S. D. 55.

[113] Per Allen, J., in People v. Albertson, 55 N. Y. 50, 54. And see Powell v. Com., 114 Pa. St. 265, affirmed in 127 U. S. 678.

expediency, wisdom, or propriety of its action in such matters.[114]

Form of Statutes and Requirements as to Enactment.—There are a number of provisions in the various constitutions with respect to the form of acts and mode of enacting them, as, for example, the provisions that an act shall be passed by both houses of the legislature, that it shall be signed by the speaker of the house and the president of the senate, and that it shall be presented to the governor for his approval, etc., and the provision that no act shall embrace more than one subject, and that this subject matter shall be expressed in its title. Statutes which violate such a provision are void.[115] This question is not at all peculiar to penal statutes, and need not be further considered.[116]

---

[114] People v. Albertson, supra; State v. Addington, 77 Mo. 110; Com. v. Colton, 8 Gray (Mass.) 488; Powell v. Com., 114 Pa. St. 265, affirmed in 127 U. S. 678; People v. Worden Grocer Co. (Mich.) 77 N. W. 315.

[115] See Moody v. State, 48 Ala. 115, 17 Am. Rep. 28; People v. Starne, 35 Ill. 142, 85 Am. Dec. 348; People v. Campbell, 8 Ill. 466; Miller v. State, 3 Ohio St. 475; State v. Platt, 2 S. C. 150, 16 Am Rep. 647.

[116] See Am. & Eng. Enc. Law, tit. "Statutes."

Local and Special Laws.—In the absence of constitutional restrictions, the legislature has the power to declare that certain acts committed in a particular locality shall constitute a criminal offense, and be punished, although such acts would not be criminal if committed in another locality or section of the state.[117] But it has no such power if the constitution declares that laws shall be uniform and equal throughout the state.[118]

37. Due Process of Law in General.

It is provided in the constitution of the United States that no state shall "deprive any person of life, liberty, or property without due process of law," and there are similar provisions in the various state constitutions. This provision is most frequently invoked against laws relating to procedure. In that connection it will be considered in another volume. It has also been invoked, however, to defeat statutes making acts criminal, and in this connection it may be shortly considered here.

38. Right to Follow Lawful Business or Occupation.

It has been held repeatedly that the right

[117] People v. Hanrahan, 75 Mich. 611.

[118] See Am. & Eng. Enc. Law, tit. "Statutes."

to liberty guarantied by the constitution embraces the right of a man "to exercise his faculties and to follow a lawful avocation for the support of life." [119] It embraces "the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation." [120] It follows that a penal statute which, by making an act a crime, arbitrarily prohibits a man from following a lawful trade or business, and which is not sustainable as a reasonable exercise of the police power of the state, is unconstitutional and void.[121]

In a New York case, a statute making it a misdemeanor to manufacture cigars, in cities of more than five hundred thousand inhabitants, in any tenement house occupied by more than three families, except on the first floor of houses on which there might

---

[119] Bertholf v. O'Reilly, 74 N. Y. 515, 30 Am. Rep. 323.

[120] In re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

[121] In re Jacobs, supra; People v. Marx, 99 N. Y. 377, 52 Am. Rep. 34; Frorer v. People, 141 Ill. 171; State v. Goodwill, 33 W. Va. 179; Braceville Coal Co. v. People, 147 Ill. 70.

be a store for the sale of cigars and tobacco, was held unconstitutional, as an unreasonable interference with a man's right to follow a lawful avocation.[122] For the same reason it has been held that the legislature cannot constitutionallv deprive a person of the right to carry on the business of banking, other than that of issuing paper to circulate as money,[123] or prohibit the sale of any article of food, or offer to sell, upon any representation or inducement that anything else will be delivered as a gift, prize, premium, or reward to the purchaser.[124]

Such statutes are not within the police power of the state. While it is for the legislature generally to determine what laws and regulations are needed to protect the public health and serve the public comfort and safety, and the exercise of its discretion in this respect is not subject to review by the courts, a statute, to be upheld as an exercise of the police power, must have some relation to these ends. The rights of property cannot be invaded under the guise of a police regula-

[122] In re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

[123] State v. Scougal, 3 S. D. 55.

[124] People v. Gillson, 109 N. Y. 389.

tion for the protection of health, etc., when it is manifest that such is not the object of the regulation.[125]

39. Right to Make Contracts.

Under the police power of the state, laws may be enacted restricting personal rights of enjoyment of property, when necessary for the comfort, safety, and welfare of society, but the legislature cannot, under the guise of the police power, unnecessarily and unreasonably interfere with the right of persons to make contracts and acquire property. The privilege of contracting is both a liberty and a property right, within the meaning of the constitution, and cannot be abridged by penal laws, unless they can be supported as a valid exercise of the police power.[126]

For this reason it has been held that the legislature cannot make it an offense for employers of weavers to impose a fine or withhold wages of their employes for imperfections in their work,[127] or for contractors doing work for a city to employ any person to

[125] People v. Gillson, 109 N. Y. 389.

[126] Frorer v. People, 141 Ill. 172; Millett v. People, 117 Ill. 294; Braceville Coal Co. v. People, 147 Ill. 70; State v. Goodwill, 33 W. Va. 179.

[127] Com. v. Perry, 139 Mass. 198.

work more than eight hours a day, or to employ Chinese laborers,[128] or require persons to pay wages weekly,[129] or deprive coal miners and those employing them of the right to fix upon the weight of coal mined, or the amount due for mining the same, in any manner mutually satisfactory.[130]

40. Class Legislation.

The words "due process of law" in the constitutional provision above mentioned is synonymous with "law of the land," and this means general public law, binding upon all the members of the community under all circumstances, and not partial or private laws, affecting the rights of particular individuals only, or particular classes of individuals.[131] The constitution, therefore, forbids the legislature to single out particular individuals

---

[128] Such a statute, said the court, is an attempt to prevent persons from employing others in a lawful business, and paying them for their services, and is a direct interference with their right to make and enforce contracts, not sustainable as an exercise of the police power. Ex parte Kuback, 85 Cal. 274.

[129] Braceville Coal Co. v. People, 147 Ill. 70.

[130] Harding v. People, 160 Ill. 459.

[131] Millett v. People, 117 Ill. 294; Frorer v. People, 141 Ill. 171; Harding v. People, 160 Ill.

or classes of individuals, and make it a crime for them to engage in a business which it is lawful for others to engage in, or to make contracts which it is lawful for others to make.[132]

Thus, it is not competent for the legislature to single out operators of mines and manufacturers of iron and other minerals, and prohibit them from making contracts which it is lawful for other owners of property and employers of labor to make.[133] For this reason, a statute is unconstitutional and void which attempts to prohibit persons engaged in mining and manufacturing from keeping a "truck store," or being interested in or controlling any store, for the purpose of furnishing supplies, tools, clothing, provisions, or groceries to their employes.[134]

459; Eden v. People, 161 Ill. 296; State v. Goodwill, 33 W. Va. 179.

[132] Frorer v. People, 141 Ill. 171; State v. Goodwill, 33 W. Va. 179.

[133] A statute making that an offense, if committed by a person engaged in one branch of mining, which, if done by persons in another branch of the same business, is lawful, without any reason for the distinction between the two, is unconstitutional. Harding v. People, 160 Ill. 459.

[134] Frorer v. People, 141 Ill. 171.

The same is true of a statute prohibiting such persons from issuing, for the payment of labor, any order or other paper whatsoever, unless the same purports to be redeemable for its face value in lawful money, etc.,[135] or depriving them and their employes of the right to fix upon the weight of coal mined, and the amount due for mining the same, in any manner mutually satisfactory.[136] A barber is deprived of his liberty and property without due process of law by a statute making it unlawful for him to do business on Sunday, where the statute does not apply to any other class of business.[137]

The police power does not justify class legislation.[138]

41. The Police Power in General.

The prohibition in the constitution against depriving any person of life, liberty, or property without due process of law does not prevent the legislature from imposing burdens upon persons or property, so long as it acts

---

[135] State v. Goodwill, 33 W. Va. 179; Godcharles v. Wigeman, 113 Pa. St. 431.

[136] Harding v. People, 160 Ill. 459.

[137] Eden v. People, 161 Ill. 296.

[138] Eden v. People, 161 Ill. 296, and other cases above cited.

within the police power of the state. Under the police power, the legislature may constitutionally enact laws for the protection of the lives, limbs, health, comfort, and quiet of all persons within the state, and the protection of all property within the state.[139] And, subject to what has been said in sections preceding this, it is generally for the legislature, and not for the courts, to determine what laws and regulations are needed for this purpose.[140] Among the laws sustainable as an exercise of the police power are license laws, quarantine laws, laws creating liability for causing death or injury to servants, laws requiring dangerous machinery to be properly guarded and used, so as to avoid injury, laws to prevent monopolies, extortion, and fraudulent imposition, and also usury laws.[141]

42. Regulations as to Food Products.

The legislature cannot arbitrarily prohibit absolutely the manufacture and sale of harmless articles of food. For this reason it has

---

[139] Frorer v. People, 141 Ill. 171.

[140] Powell v. Com., 114 Pa. St. 265, affirmed in 127 U. S. 678; People v. Gillson, 109 N. Y. 389, and cases cited in notes following.

[141] Frorer v. People, 141 Ill. 171.

been held that a statute absolutely prohibiting and punishing the manufacture or sale for food of any substitute for butter or cheese produced from pure unadulterated cream or milk,—as oleomargarine,—and not merely requiring such substitute to be marked so as to prevent fraud upon the public, is unconstitutional.[142]

Prevention of Fraud.—The legislature, however, has the power to enact laws for the protection of the public against fraud and deception in the sale of articles of food in common and general use. This is clearly a legitimate exercise of the police power of the state. Statutes, therefore, merely regulating the sale of articles of food, and punishing adulteration, deception, and fraud, are unquestionably valid; and whether a particular regulation of this character is necessary, reasonable, or expedient is a question for the legislature, and not for the courts.[143]

---

[142] People v. Marx, 99 N. Y. 377, 52 Am. Rep. 34. And see Northwestern Mfg. Co. v. Wayne Circuit Judge, 58 Mich. 381, 55 Am. Rep. 693.

[143] The following statutes of this character have been sustained by the courts:

Statutes prohibiting and punishing the sale or

Protection of Public Morals, Health, and Comfort.—It is also a legitimate exercise of police power of the state to enact laws regulating the manufacture and sale of food products, and other articles, to such an extent as may be necessary to properly protect the morals, health, and comfort of the public. Thus, the legislature may regulate or prohibit the

---

keeping for sale of oleomargarine or other substances in imitation of butter, without marking them so as to show what they are, and statutes regulating generally the sale of dairy products, and punishing their adulteration. Powell v. Com. 114 Pa. St. 265, affirmed in 127 U. S. 678; State v. Addington, 77 Mo. 110; State v. Marshall, 64 N. H. 549; People v. Arensberg, 103 N. Y. 388, 57 Am. Rep. 741; Palmer v. State, 39 Ohio St. 236; State v. Horgan, 55 Minn. 183; Pierce v. State, 63 Md. 592.

Statutes prohibiting the sale of adulterated or watered milk. See the cases above cited, and see Butler v. Chambers, 36 Minn. 69; Com. v. Waite, 11 Allen (Mass.) 264, 87 Am. Dec. 711; Com. v. Evans, 132 Mass. 11; People v. West, 106 N. Y. 293, 60 Am. Rep. 452; State v. Smyth, 14 R. I. 100, 51 Am. Rep. 344.

Statutes prohibiting the sale of vinegar below a certain standard. People v. Worden Grocer Co. (Mich.) 77 N. W. 315.

Statutes requiring that baking powder containing alum shall be so marked as to show that fact. Stolz v. Thompson, 44 Minn. 271.

sale of intoxicating liquors,[144] and it may prevent the keeping of cows in an unhealthy or crowded condition, and the adulteration of dairy products,[145] or of confectionery or other articles of food.[146]

43. Regulation of Places of Amusement.

It is also within the power of the state legislatures to regulate theatres, billiard rooms, and other places of amusement and sport, so as to prevent annoyance or disturbance of the community, corruption of the public morals, etc.[147]

Statutes regulating the manufacture and sale of lard and lard compounds and substitutes, and of foods prepared therefrom. State v. Aslesen, 50 Minn. 5.

Statutes prohibiting the sale of adulterated confectionery. Com. v. Chase, 125 Mass. 202.

[144] Santo v. State, 2 Iowa, 165, 63 Am. Dec. 487; Thurlow v. Com., 5 How. (U. S.) 504; Woods v. State, 36 Ark. 38; Keller v. State, 11 Md. 525, 69 Am. Dec. 226.

[145] Powell v. Com., 114 Pa. St. 265, affirmed in 127 U. S. 678; Butler v. Chambers, 36 Minn. 69; note 143, supra.

[146] Com. v. Chase, 125 Mass. 202; Stolz v. Thompson, 44 Minn. 271. And see the other cases cited in notes preceding.

[147] Thus, the legislature may prohibit the keeper of a billiard room or bowling alley from allow-

44. Ex Post Facto Laws.

It is provided by the constitution of the United States that no "*ex post facto* law" shall be passed by congress,[148] or by any state,[149] and in the state constitutions there is a similar limitation on the power of the legislature. An "*ex post facto* law," within the meaning of this prohibition, is "one which, in its operation, makes that criminal which was not so at the time that the action was performed, or which increases the punishment, or, in short, which, in relation to the offense or its consequences, alters the situation of a party, to his disadvantage." [150] In a sense, all acts passed after an offense is committed are *ex post facto* in relation to that

---

ing playing therein after a certain time in the evening or night. Com. v. Colton, 8 Gray (Mass.) 488.

[148] Const. U. S. art. 1, § 9.

[149] Id. § 10.

[150] Per Mr. Justice Washington in U. S. v. Hall, 2 Wash. C. C. 366, Fed. Cas. No. 15,285. And see Kring v. Missouri, 107 U. S. 221; Marion v. State, 16 Neb. 349, 20 Neb. 233, 57 Am. Rep. 825; In re Medley, 134 U. S. 160; Duncan v. Missouri, 152 U. S. 377; Garvey v. People, 6 Colo. 559, 45 Am. Rep. 531.

In Fletcher v. Peck, 6 Cranch, 87, Chief Justice

offense, but the words are not used in so broad a sense in the constitution.

Laws Creating or Aggravating Offenses.—This prohibition in the constitution clearly prevents the legislatures from punishing as a crime an act previously committed, and which was innocent or not punishable when committed, and from aggravating an offense previously committed.[151]

Marshall said that an ex post facto law was a law which rendered "an act punishable in a manner in which it was not punishable when it was committed."

And in Calder v. Bull, 3 Dall. (U. S.) 386, Mr. Justice Chase defined such a law as (1) "any law which makes an act done before the passing of the law, and which was innocent when done, criminal;" (2) "any law which aggravates a crime, and makes it greater than it was when committed;" (3) "any law which changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed;" (4) "any law which alters the legal rules of evidence."

[151] Calder v. Bull, 3 Dall. (U. S.) 386; Com. v. Edwards, 9 Dana (Ky.) 447; Marion v. State, 16 Neb. 349.

It has been held that a statute which purports to authorize the prosecution, trial, and punishment of a person for an offense previously committed, and as to which prosecution and punishment is, at its passage, barred by the pre-existing

Laws Affecting Punishment.—It is also a violation of this provision for the legislature to increase the punishment for an act previously committed,[152] or to change the punishment, and substitute a different punishment, where the change does not amount merely to a remission of a separable portion of the punishment prescribed at the time the offense was committed, or a clear mitigation of the punishment.[153] It is otherwise if a law

---

statute of limitations, or by an act of amnesty, is unconstitutional. Moore v. State, 43 N. J. Law, 203, 39 Am. Rep. 558 (six judges voting "yes," and five voting "no"); State v. Sneed, 25 Tex. Supp. 66; State v. Keith, 63 N. C. 140; Thompson v. State, 54 Miss. 740.

[152] In re Medley, 134 U. S. 160; Hartung v. People, 22 N. Y. 95, 26 N. Y. 167; Shepherd v. People, 25 N. Y. 406; Johnson v. People, 173 Ill. 131; Com. v. Mott, 21 Pick. (Mass.) 492; Flaherty v. Thomas, 12 Allen (Mass.) 728; Murphy v. Com. 172 Mass. 264; Marion v. State, 16 Neb. 349; Ex parte Hunt, 28 Tex. App. 361; Lindzey v. State, 65 Miss. 542, 7 Am. St. Rep. 674.

[153] Hartung v. People, 22 N. Y. 95, 26 N. Y. 167; Shepherd v. People, 25 N. Y. 406; In re Petty, 22 Kan. 477; Murphy v. Com., 172 Mass. 264; Lindzey v. State, 65 Miss. 542, 7 Am. St. Rep. 674.

When, at the time a murder is committed, it is punishable by death or imprisonment for life, the penalty to be fixed by the jury, a statute divid-

merely remits a portion of the punishment,

---

ing murder into degrees, and punishing murder in the first degree by death, and divesting the jury of authority to fix the penalty at imprisonment for life, is unconstitutional as to this murder. Marion v. State, 16 Neb. 349.

A law changing the punishment from death to one year's imprisonment at hard labor, and then death, if the governor shall issue his warrant therefor, or from death, merely, to death and imprisonment by solitary confinement until execution, is unconstitutional, as applied to offenses previously committed. Hartung v. People, 22 N. Y. 95, 26 N. Y. 167; In re Petty, 22 Kan. 477; In re Medley, 134 U. S. 160.

Where an act is punishable by fine or imprisonment, a statute diminishing the extreme limit of imprisonment, but increasing the extreme limit of the fine, is unconstitutional. Flaherty v. Thomas, 12 Allen (Mass.) 428.

The same is true of a change from fine "or" imprisonment to fine "and" imprisonment. Flaherty v. Thomas, supra; Com. v. McDonough, 13 Allen (Mass.) 581.

The legislature cannot take away from one who has committed a crime the right to a deduction from his term of imprisonment for good behavior, which was allowed at the time the act was committed. Murphy v. Com. 172 Mass. 264; In re Canfield, 98 Mich. 645.

Nor can it reduce the amount per day allowed to a convict as a credit on his fine and costs, when

or otherwise merely mitigates it.[154] Laws which provide for an increased punishment for a second or third offense are not within the prohibition, though the prior offense may have been committed before its enactment.[155]

---

working out the same. Ex parte Hunt, 28 Tex. App. 361.

[154] Com. v. Wyman, 12 Cush. (Mass.) 237; Com. v. Gardner, 11 Gray (Mass.) 438; People v. Hayes, 140 N. Y. 484, 37 Am. St. Rep. 572; Hartung v. People, 22 N. Y. 95, 105; In re Petty, 22 Kan. 477. And see State v. Williams, 2 Rich. (S. C.) 418, 45 Am. Dec. 741.

In Hartung v. People, supra, Judge Denio said that "anything which, if applied to an individual sentence, would fairly fall within the idea of a remission of a part of the sentence, would not be liable to objection," as a change from punishment by fine and imprisonment to fine or imprisonment.

The Massachusetts court held that a change of the punishment from death to imprisonment for life at hard labor was not unconstitutional, on the ground that this was a mitigation of the punishment. Com. v. Wyman, 12 Cush. (Mass.) 237; Com. v. Gardner, 11 Gray (Mass.) 438. See, also, McInturf v. State, 20 Tex. App. 335.

The contrary was held in New York. Shepherd v. People, 25 N. Y. 406.

[155] Blackburn v. State, 50 Ohio St. 428; Com. v. Marchaud, 155 Mass. 8; People v. Butler, 3 Cow. (N. Y.) 347. And see In re Miller, 110 Mich. 676.

Prison Discipline.—Any change in the law which is fairly referable to prison discipline, or penal administration, as its primary object, may be made to take effect upon past as well as future offenses, as changes in the manner or kind of employment of convicts sentenced to hard labor, the system of supervision, the means of restraint, and the like. Changes of this sort may operate to increase or mitigate the severity of the punishment of the convict, but they are not within the constitutional prohibition.[156]

Laws Regulating Mode of Procedure.—Laws regulating the mode of procedure in criminal cases are not within the constitutional prohibition if they do not dispense with any of the substantial protections with which the existing law surrounds the accused.[157] It is competent, therefore, for the legislature, as to offenses previously committed, to change the place of trial, or the tribunal before which the accused shall be tried; to change the mode of summoning or impan-

---

[156] Hartung v. People, 22 N. Y. 95; Murphy v. Com., 172 Mass. 264.

[157] Cooley, Const. Lim. 272; Gut v. State, 9 Wall. (U. S.) 35; Hopt v. People of Utah, 110 U. S. 574; People v. Mortimer, 46 Cal. 116.

eling the jury; to give the state additional challenges to jurors, or change the time or grounds of challenging; to authorize the amendment of indictments, and the like.[158]

Rules of procedure, however, cannot be changed as to existing offenses, if the change injuriously affects any substantial right to which the accused is entitled under the law in force when the offense was committed.[159] Thus, if the law in force at the time of a homicide makes a conviction and sentence for murder in the second degree an acquittal of the crime of murder in the first degree, though such conviction be reversed, the legislature cannot change the law, and allow another prosecution for murder in the first de-

---

[158] See the cases cited above. And see Cook v. U. S., 138 U. S. 157; Thompson v. Missouri, 171 U. S. 380; Gibson v. Mississippi, 162 U. S. 566; Duncan v. Missouri, 152 U. S. 377; Marion v. State, 16 Neb. 349, 20 Neb. 233, 57 Am. Rep. 825; Walston v. Com., 16 B. Mon. (Ky.) 15; Moore v. State, 43 N. J. Law, 203, 39 Am. Rep. 558; State v. Manning, 14 Tex. 402; Stokes v. People, 53 N. Y. 164, 13 Am. Rep. 492; Jacquins v. Com., 9 Cush. (Mass.) 279; State v. Taylor, 134 Mo. 109; Com. v. Hall, 97 Mass. 570.

[159] Kring v. Missouri, 107 U. S. 221.

gree.[160] Nor can it reduce the number of jurors.[161]

Changing Rules of Evidence.—A law is unconstitutional, as applied to offenses previously committed, if it changes the rules of evidence to such an extent as to allow a conviction on less evidence or proof than was previously required.[162] But a law may be enacted which simply enlarges the class of persons who may be competent to testify, for this does not alter the degree or measure of proof required.[163]

---

[160] Kring v. Missouri, 107 U. S. 221.

[161] Thus, in Thompson v. Utah, 170 U. S. 343, the provision in the constitution of the state of Utah for the trial of criminal cases, not capital, in courts of general jurisdiction by a jury composed of eight persons only, was held unconstitutional as to offenses committed before the territory became a state.

[162] Calder v. Bull, 3 Dall. (U. S.) 386; Duncan v. Missouri, 152 U. S. 377; Hart v. State, 40 Ala. 32, 88 Am. Dec. 752; State v. Johnson, 12 Minn. 476, 93 Am. Dec. 241.

Thus, the necessity for corroboration of witnesses cannot be dispensed with. Hart v. State, supra.

[163] Hopt v. People of Utah, 110 U. S. 574. And see Mrous v. State, 31 Tex. Cr. R. 597, 37 Am. St. Rep. 834.

45. Indefiniteness of Statutes.

Except as to common-law offenses, it is for the legislature, not the courts, to determine what acts are to be punished as crimes. A penal statute, therefore, to be valid, must be sufficiently definite to show what acts the legislature intended to punish. It must define the offense with certainty, either by specifying the acts which shall constitute it, or by describing it by some name known to the common law.[164] The description, though general, is sufficiently definite if the court, by giving the words their ordinary meaning, can say what acts were intended to be punished.[165] A statute punishing a crime, and

[164] State v. Partlow, 91 N. C. 550, 49 Am. Rep. 652; Foster v. Territory, 1 Wash. 411. See State v. Mann, 2 Or. 238, where this principle is recognized, but wrongly applied.

[165] An act punishing any person who "shall disturb any religious society, when meeting together in religious worship," is not void as failing to sufficiently define the offense. State v. Stuth, 11 Wash. 423.

Nor are statutes to suppress gaming houses and gambling too indefinite because they use general words, without defining them, — as "gaming house," "gaming table," "gaming device," "faro," "banking game," etc. U. S. v. Speeden, 1 Cranch, C. C. 535, Fed. Cas. No. 16,366; Miller v. State,

merely describing it by a general name known to the common law, as "rape," "robbery," "arson," "assault and battery," etc., is not too indefinite.[166]

46. Construction of Statutes—In General.

Unfortunately, in the enactment of penal statutes, the legislature does not always express itself in clear and unambiguous language. In such a case it is for the courts to construe the statute, and ascertain, if possible, what the legislature intended. In the construction of statutes in cases of doubt, the courts are governed by certain well-established rules. These rules, or the most important of them, will be given in the following sections.

The Intention of the Legislature Governs.—The principal rule is that the intention of the legislature governs. Whenever the intention of the legislature is manifest, it must be given effect, provided the statute is not un-

---

48 Ala. 122; People v. Carroll, 80 Cal. 153; State v. Thomas, 50 Ind. 292.

[166] See State v. Berdetta, 73 Ind. 185, 38 Am. Rep. 117; Ledgerwood v. State, 134 Ind. 81; Ex parte Bergen, 14 Tex. App. 52; Prindle v. State, 31 Tex. Cr. R. 551, 37 Am. St. Rep. 833; Houston v. Com., 87 Va. 257.

constitutional. This is the *paramount* rule of construction.[167] "All the rules of construction must give way to the fundamental principle that the intention of the legislature is to govern. * * * The design of all rules is to furnish guides to assist in arriving at the intention of the legislature." [168]

Reasonable Construction.—Another rule, applicable in all cases, is that statutes must have a reasonable construction.[169]

47. Rules to Aid in Construction.

(*a*) *Ordinary Meaning of Language.*—Except as to technical terms, statutes are to be construed according to the ordinary and literal meaning of their language, if that meaning can be clearly ascertained.[170] But words

---

[167] Cain v. State, 20 Tex. 355; Walker v. State, 7 Tex. App. 245; Albrecht v. State, 8 Tex. App. 313; Smith v. People, 47 N. Y. 330; People v. Potter, 47 N. Y. 375, 379; Noble v. State, 1 G. Greene (Iowa) 325; Parkinson v. State, 14 Md. 184, 194; State v. Stephenson, 2 Bailey (S. C.) 334; Com. v. Kimball, 24 Pick. (Mass.) 366, 35 Am. Dec. 326; Keener v. State, 18 Ga. 194, 63 Am. Dec. 269.

[168] Cain v. State, 20 Tex. 355.

[169] Walker v. State, 7 Tex. App. 245.

[170] Coolidge v. Choate, 11 Metc. (Mass.) 79, 82; Remmington v. State, 1 Or. 281; People v. Todd, 51 Hun (N. Y.) 446, 451.

will be construed contrary to their literal meaning, when necessary in order to give effect to the manifest intention of the legislature.[171]

(*b*) *Strict Construction.*—It is a well-settled rule that, in the absence of express statutory provision to the contrary, penal statutes are to be strictly construed in favor of the

---

The courts are not at liberty to construe a statute contrary to its ordinary and grammatical meaning, merely because such a construction is necessary to render the statute effective. If the legislature has failed to accomplish its object by the enactment of a penal statute, "it is to that authority, and not to the courts, that the public must look for a correction of the mistake. Remmington v. State, 1 Or. 281.

"The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest." Per Chief Justice Marshall, in U. S. v. Wiltberger, 5 Wheat. (U. S.) 76.

[171] Cain v. State, 20 Tex. 355; Walker v. State, 7 Tex. App. 245; Albrecht v. State, 8 Tex. App. 313; Smith v. People, 47 N. Y. 330; People v. Potter, 47 N. Y. 375, 379; Noble v. State, 1 G. Greene (Iowa) 325.

accused.[172] By this it is meant that they are to be construed strictly in those parts which are against the accused, but liberally in those parts which are in his favor.[173] No person is to be made subject to such statutes by implication, and when doubts arise concerning their interpretation, they are to weigh only in favor of the accused.[174] This does not mean, however, that a penal statute is to be

---

[172] U. S. v. Lacher, 134 U. S. 624; U. S. v. Wiltberger, 5 Wheat. (U. S.) 76; Lescallett v. Com., 89 Va. 878; Warner v. Com., 1 Pa. St. 154, 44 Am. Dec. 114; State v. Bryant, 90 Mo. 534; Com. v. Hickey, 2 Pars. Sel. Cas. (Pa.) 317; Steel v. State, 26 Ind. 82.

"There can be no constructive offenses, and, before a man can be punished, his case must be plainly and unmistakably within the statute." U. S. v. Lacher, supra.

"The rule that penal statutes are to be construed strictly is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the main principle that the power of punishment is vested in the legislative, not in the judicial, department. It is the legislature, not the court, which is to define a crime, and ordain its punishment." Per Chief Justice Marshall, in U. S. v. Wiltberger, 5 Wheat. (U. S.) 76.

[173] State v. Bryant, 90 Mo. 534.

[174] State v. Bryant, 90 Mo. 534.

construed so strictly as to defeat the obvious intention of the legislature. The courts are bound to give effect to the plain and obvious meaning of a statute, and not narrow it by construction.[175]

(*c*) *Reason and Purpose of Statute.*—When the meaning of a statute is doubtful, the reason and purpose of its enactment are to be taken into consideration in construing it, and determining the intention of the legislature. In other words, though a penal statute cannot be extended by construction, it should, if possible, receive such a construction

---

[175] Parkinson v. State, 14 Md. 184, 194; U. S. v. Wiltberger, 5 Wheat. (U. S.) 76; Keller v. State, 11 Md. 525, 69 Am. Dec. 226; Wedge v. State, 12 Md. 235; Gibbons v. People, 33 Ill. 443.

In State v. Thatcher, 35 N. J. Law, 445, 452, it was said: "The rule of strict interpretation for criminal statutes does not hinder the court from searching for the legislative will; nor is the rule violated by giving words, in some cases, their full, or the more extended of two meanings, as the wider popular, instead of the narrow technical, one. Cases are not wanting where some elasticity has been given to criminal statutes in order to extend them to the mischief obviously aimed at."

This is well illustrated by the case of People v. Cotteral, 18 Johns. (N. Y.) 115, where a jail was held to be an "inhabited dwelling house," within the meaning of the statute against arson,

as, when practically applied, will tend to suppress the evil which the legislature intended to prohibit.[176] "The pre-existing law, the evils which arose out of it, and the remedy intended to be applied, are useful guides in the interpretation of a doubtful statute. A knowledge of the old law and the remedy applied by the new frequently points out the evil, and enables us to correct it." [177] It is not permissible, however, to vary or add to the provisions of a statute on any consideration of its reason and purpose, if the meaning of the legislature is clear.[178]

(*d*) *Preamble and Title of Act.*—It is a well-settled principle, applicable to penal statutes, as well as to others, that the preamble and the title of an act may be resorted to as an aid in ascertaining the intention of the legislature. Thus, in a South Carolina case, where an act made it larceny for any person to fraudulently take from any field, not belonging to him, "any cotton, corn, rice, or other

---

[176] Smith v. State, 52 Ala. 384, 388; Gibbons v. People, 33 Ill. 443; People v. Forbes, 4 N. Y. Supp. 757.

[177] State v. Stephenson, 2 Bailey (S. C.) 334.

[178] State v. Stephenson, 2 Bailey (S. C.) 334; Warner v. Com., 1 Pa. St. 154, 44 Am. Dec. 114.

grain," etc., without saying anything as to its being severed before the taking, but the act was entitled, "An act to make the fraudulent and secret taking of cotton, corn, and other grain, *before severance from the soil,* larceny," the court took the title into consideration, and held that the act made a severance and taking of growing grain larceny, though it was not larceny at common law.[179]

(*e*) *Construction with Reference to the Common Law.*—Statutes frequently prescribe a punishment for an offense without defining it further than by giving it a name known to the common law,—as "murder," "manslaughter," "rape," "robbery," "perjury," etc. In such a case, the common law must be resorted to in order to determine the nature and elements of the offense.[180] And

---

[179] State v. Stephenson, 2 Bailey (S. C.) 334.

[180] State v. Camley, 67 Vt. 322; State v. Twogood, 7 Iowa, 252; U. S. v. Jones, 3 Wash. C. C. 209, Fed. Cas. No. 15,494; In re Greene, 52 Fed. 104; U. S. v. Wilson, Baldw. 78, Fed. Cas. No. 16,730; State v. Berdetta, 73 Ind. 185, 38 Am. Rep. 117; U. S. v. Palmer, 3 Wheat. (U. S.) 610, 630; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711, 716; Benson v. State, 5 Minn. 19.

If a statute punishes an offense without defining it further than by calling it by a name known

184656

when a statute uses other terms, which have a settled meaning in the common law, this meaning is to be given them, unless there is something to show that the legislature intended otherwise. Thus, the words "dwelling house," "breaking," and "entry," in statutes defining and punishing burglary, "burning," in statutes defining and punishing arson, "from the person," "or by violence or putting in fear," in statutes defining and punishing robbery, etc., are, unless a contrary intention appears, to be given a construction in accordance with their meaning at common law.[181]

---

to the common law, the common-law definition applies. Prindle v. State, 31 Tex. Cr. R. 551, 37 Am. St. Rep. 833; State v. Twogood, 7 Iowa, 252; Com. v. York, 9 Metc. (Mass.) 93, 109; Houston v. Com., 87 Va. 257; and other cases cited above.

[181] Com. v. Humphries, 7 Mass. 242; Pitcher v. People, 16 Mich. 142; State v. Calhoun, 72 Iowa, 432, 2 Am. St. Rep. 252; Long v. State, 12 Ga. 293, 320; Ex parte Vincent, 26 Ala. 145, 62 Am. Dec. 714; Finch v. Com., 14 Grat. (Va.) 643; Nicholls v. State, 68 Wis. 416; Quinn v. People, 71 N. Y. 561, Beale's Cas. 789; Schwabacher v. People, 165 Ill. 618; Mary v. State, 24 Ark. 44, 81 Am. Dec. 60; People v. Gates, 15 Wend. (N. Y.) 159. See post, §§ 379, 409, 416.

In an Alabama case it was said: "When words are used by the legislature in relation to a matter

Statutes defining and punishing offenses are also to be construed in accordance with the common law in relation to principals and accessaries, responsibility of children, insane persons, etc., and the necessity generally for a criminal intent.[182]

(*f*) *Change of the Common Law.*—It must be remembered, however, that it is competent for the legislature to create new offenses, and to extend the common-law definitions of particular offenses, so as to punish, under common-law names, acts not embraced

---

or subject, which, when used in reference to the same subject at common law, have obtained a fixed and definite meaning, the inference is irresistible that they were intended to be used in the common-law sense." Ex parte Vincent, 26 Ala. 145, 62 Am. Dec. 714.

[182] Duncan v. State, 7 Humph. (Tenn.) 148; post, §§ 56, 70.

Statutes punishing any person who should dispose of crops or other property after giving a mortgage thereon have been construed in the light of the common-law principle that the contract of an infant is voidable at his option, and it has been held that an infant's sale of property on which he has given a mortgage, being a disaffirmance and avoidance of the mortgage, does not render him liable under such a statute. State v. Howard, 88 N. C. 650; State v. Plaisted, 43 N. H. 413.

[183] Ante, § 14.

in the common-law definitions.[183] And it follows that identity in the name of offenses at common law and under a statute does not necessarily imply that the same elements, and no others, enter into both.[184] Whether a statutory offense is the same as an offense known to the common law must depend upon the language of the particular statute, and the intention of the legislature.

(*g*) *Prior Judicial Construction.*—When the legislature enacts a statute which is substantially the same as one which has already received a judicial construction, it will be presumed to have known that construction, and to have intended to adopt it.[185]

(*h*) *Construction as a Whole—Giving Effect to All Parts.*—In construing a statute, the intention of the legislature is not to be ascertained from any particular expression or section, but from the whole act. It is a cardinal principle that a statute is to be construed as a whole, and effect is to be given, if possible, to every section and clause.[186]

(*i*) *Construction of Statutes Together.*—In ascertaining the meaning of a particular

[184] People v. Most, 128 N. Y. 108.

[185] O'Byrnes v. State, 51 Ala. 25; State v. Brewer, 22 La. Ann. 273.

statute, all statutes *in pari materia* are to be taken into consideration. In other words, all statutes on the same subject, whether enacted on the same day, or on different days of the same session, or at different sessions, are to be taken together as one law.[187]

Ah Ho, 1 Idaho, 691; People v. Potter, 47 N. Y. Ah Ho, 1 Idaho 691; People v. Potter, 47 N. Y. 375, 379; People v. Todd, 51 Hun (N. Y.) 446, 451; Parkinson v. State, 14 Md. 184, 195.

[187] Cain v. State, 20 Tex. 355, 362; State v. Hope, 15 Ind. 474; State v. Rackley, 2 Blackf. (Ind.) 249; Keller v. State, 11 Md. 525, 69 Am. Dec. 226; Myers v. State, 3 Sneed (Tenn.) 98; Howlett v. State, 5 Yerg. (Tenn.) 144, 151; Smith v. People, 47 N. Y. 330.

Statutes in relation to the same offense must be taken together, and construed as if the matters to which they relate were embraced in a single statute. State v. Wilbor, 1 R. I. 199, 36 Am. Dec. 245.

In Indiana, a statute approved June 10, 1852, provided that any person who should be the keeper of "any gaming apparatus," for the purpose of winning or gaining any article of value, should be deemed a professional gambler, and subject to punishment in the penitentiary. Another statute, approved on June 14th, declared that any person who should be the keeper or exhibitor of "any gaming table, roulette, * * * or billiard table," for the purpose of winning any article of value thereon, should be liable to a fine. In State

(*j*) *Construction in Connection with the Constitution.*—Unless a contrary intention clearly appears, it is to be presumed that the legislature intended a statute to be in accordance with constitutional provisions, and statutes, therefore, are to be construed in connection with the constitution, and, if possible, so as to be in accordance therewith. "It is a well-recognized principle that courts will not so construe a statute as to render it unconstitutional, if any other reasonable construction can be placed upon it, which will render it effective and legal."[188]

(*k*) *Expression of One Thing an Exclusion of Others.*—The maxim, *expressio unius est exclusio alterius,* applies in the construction of penal statutes. Thus, where a statute provided that certain games of chance might be kept on being licensed, and declared that

---

v. Hope, 15 Ind. 474, it was held that these two statutes must be construed together, and that, as the last-mentioned statute specially prohibited the keeping of a billiard table for gaming, and made it a misdemeanor only, the keeping of such a table was not a felony, within the first-mentioned statute, though it might have been so regarded except for the second statute.

[188] People v. Peacock, 98 Ill. 172, 177. And see Eskridge v. State, 25 Ala. 30.

certain others should be unlawful, it was held that all games not mentioned in the statute were legalized.[189]

(*l*) *Special Enumeration Followed by General Words.*—In the construction of penal statutes, the courts are also governed by the general rule that, "where a particular class is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters *ejusdem generis* with such class."[190] Thus, where a statute provided that "no tradesman, artificer, workman, laborer, or other person whatsoever," should exercise his ordinary calling on Sunday, it was held that the words "other person whatsoever" were intended to refer to persons of like denomination with those specially mentioned, and not to all persons, without regard to their occupation, and that the statute, therefore, did not apply to farmers.[191]

---

189 People v. Goldman, 1 Idaho, 714.

190 Broom, Leg. Max. 625; Rex v. Inhabitants of Whitnash, 7 Barn. & C. 596; State v. Bryant, 90 Mo. 534.

191 Rex v. Inhabitants of Whitnash, 7 Barn. & C. 596. In this case, Bayley, J., remarked that if all persons were meant, there was no need of the specific enumeration.

This rule of construction has also been applied to statutes enumerating things of a particular class, and concluding with general words,—as statutes against gaming, enumerating particular games or devices, as faro, roulette, etc., and concluding with the words, "or any other device." These words have generally been construed as referring to such devices only as are of like kind with those enumerated.[192]

(*m*) *Punctuation.*—The punctuation of a statute is not necessarily to be considered in ascertaining its meaning. It may always be disregarded in order to make the statute conform to the evident intention of the legislature.[193]

---

[192] State v. Bryant, 90 Mo. 534; State v. Hardin, 1 Kan. 474; Stith v. State, 13 Ark. 680; Marquis v. City of Chicago, 27 Ill. App. 253; State v. Shaw, 39 Minn. 153; Nuckolls v. Com., 32 Grat. (Va) 884; People v. Todd, 51 Hun (N. Y.) 446. Compare State v. Lewis, 12 Wis. 434.

There are many other statutes in the construction of which this rule has been applied. See Shirk v. People, 121 Ill. 61.

[193] "In giving construction to a statute, the punctuation is entitled to small consideration, for that is more likely to be the work of the engross-

48. Intention to Make Prohibited Act a Crime.

It is not always clear whether the legislature, in prohibiting an act and imposing a penalty for its commission, intended to make the act a crime, and to require the penalty to be imposed in a criminal prosecution, instead of merely subjecting the person doing the act to liability in a civil action.[194] Of course the intention of the legislature must govern, and its intention is to be gathered from the whole act, the terms used in it, and the purpose of the prohibition. It may be laid down, as a general rule, that if the purpose is to protect

---

ing clerk, or the printer, than of the legislature." Morrill v. State, 38 Wis. 428, 434. See, also, Schriedley v. State, 23 Ohio St. 130, 139; State v. Pilgrim, 17 Mont. 311.

Thus, in "Schriedley v. State, supra, a statute punishing the receiving of goods "that have been stolen or taken by robbers" was construed as covering the receiving of goods stolen in any way, as well as of goods taken by robbery, though to construe it according to the punctuation, there being no comma after the word "stolen," it would apply only to goods stolen by robbers or taken by robbers.

[194] In Wisconsin it was held that a statute subjecting to a pecuniary penalty only any person who should willfully obstruct a public highway,

the public generally, and the terms used in the statute are such as are generally employed in a penal statute, like the words "offense," "fine," "prosecution," "conviction," "punishment," etc., the statute should be construed as making the act a crime, and rendering the doer liable to a criminal prosecution.[195] If

---

to be recovered in an action brought in the name of the state, did not create a criminal offense, and that an action by the state to recover the penalty was a civil action. State v. Hayden, 32 Wis. 663; State v. Smith, 52 Wis. 134.

As to the act of congress excluding Chinese from the United States, see U. S. v. Hing Quong Chow, 53 Fed. 233, Beale's Cas. 123.

[195] In State v. Horgan, 55 Minn. 183, a statute provided that whoever should sell or keep for sale an article in imitation of butter, etc., should be subject to the payment of a "penalty" of $50, and, for a second "offense," a penalty of $100, "to be recovered, with costs, in any court of competent jurisdiction." In another section, possession of the article "prohibited" by the act was made prima facie evidence that the same was kept in "violation" thereof. In another section, the word "fine" was used instead of "penalty," and in another, proceedings to enforce the law were spoken of as "prosecutions." It was held that the act prohibited was a misdemeanor, and that the penalty was to be imposed as a fine in a criminal prosecution. See, also, State v. Marshall, 64 N. H. 549.

the statute imposes a "fine," and, in default thereof, imprisonment, the act is clearly made a crime, unless a contrary intention is very plainly shown.[196] The statute need not expressly and in terms declare the act to be a crime, or a felony, or a misdemeanor.[197]

In Oregon, a statute provided that county warrants indorsed, "Not paid for want of funds," should bear interest from the date of such indorsement until the treasurer should give notice that there were funds to redeem them, that such notice should be given when he should have as much as $1,500 belonging to the county, and that, for failure to comply with the statute, he should, on "conviction" thereof, be "punished" by a "fine" of not less than $500, nor more than $1,000. Laws 1893, p. 60. It was held that this statute created a criminal offense. Ex parte Howe, 26 Or. 181.

[196] See State v. Burton, 113 N. C. 655. Compare Oshkosh v. Schwartz, 55 Wis. 483.

"A fine," said Lord Coke, "signifieth a pecuniary punishment for an offense or contempt against the king." 1 Co. Litt. 126 b.

[197] Ex parte Howe, 26 Or. 181, and the other cases above cited.

A statute providing merely that every person convicted of the willful burning of a gin house shall be imprisoned for not less than five, nor more than ten, years, creates an offense, notwithstanding it does not expressly state that such person shall be guilty of a felony. State v. Pierce, 123 N. C. 745.

Bastardy Proceedings.—Where a statute subjects the father of a bastard child to proceedings, either in the name of the mother or in the name of the state, merely to charge him with the child's maintenance, and not to punish him by a fine or otherwise, the object is not to punish him as for a crime, but to give redress to the mother, or else to indemnify the county against liability for the support of the child as a pauper, and such a statute does not make the begetting of a bastard child a misdemeanor. The proceeding, even though it may be in the name of the state, is civil, not criminal.[198] If a statute, however, provides for the imposition of a fine in bastardy proceedings, upon a finding of the issue of paternity against the defendant, in addition to the allowance to be made for the use of the mother, and declares that he shall be imprisoned in default of payment, the begetting of a bastard child is thereby made a misdemeanor, and the proceeding is criminal.[199]

---

[198] State v. Pate, Busb. (N. C.) 244; State v. Burton, 113 N. C. 655; State v. Johnson, 89 Iowa, 1; Hodge v. Sawyer, 85 Me. 285.

[199] State v. Burton, 113 N. C. 655; Myers v. Stafford, 114 N. C. 234, 689; State v. Cagle, 114 N. C. 835.

IV. EXPIRATION AND REPEAL OF LAWS.

49. In General.—Laws may be repealed expressly or impliedly. Repeals by implication are not favored, and, as a rule, a law is not to be taken as repealed by a later law unless there is an irreconcilable conflict between them. There is generally an implied repeal, however,

1. **When there is an irreconcilable repugnancy between the earlier and the later law.**
2. **When the later law undertakes to cover the whole subject matter covered by the earlier law.**

An act cannot be punished after the law making it punishable has been repealed without a saving clause, though it may have been committed, and even though there may have been a conviction therefor, before the repeal.

Unless otherwise provided, the repeal of a repealing law revives the pre-existing law.

50. Implied Repeal of Statutes.

When the legislature intends to repeal a statute, it generally does so in express terms, but this is not always the case. Sometimes, when a statute is enacted on a particular subject, nothing at all is said about existing laws on the same subject, and the question may then arise whether an existing law is impliedly repealed. Repeals by implication are not favored, and the general rule is that an intention to repeal a prior law will never be im-

plied if it can be avoided by any reasonable construction of the statutes. If both acts can be given full force without conflict, or if the later act is merely affirmative, or cumulative, or auxiliary, and not inconsistent, the earlier act is not repealed, and both must stand.[200]

---

[200] Per Champlin, J., in People v. Hanrahan, 75 Mich. 611, 612. And see, to the same effect: Com. v. Wyman, 12 Cush. (Mass.) 237; Flaherty v. Thomas, 12 Allen (Mass) 428; Chamberlain v. State, 50 Ark. 137; State v. Rieger, 59 Minn. 151; Walker v. State, 7 Tex. App. 245; Cain v. State, 20 Tex. 355; People v. Platt, 67 Cal. 22.

The rule as to the repeal of a prior by a subsequent statute is well stated in Chamberlain v. State, 50 Ark. 137, by Judge Smith, as follows: "Subsequent laws do not abrogate prior ones unless they are irreconcilably in conflict. The courts have always leaned against implied repeals. A general affirmative statute does not repeal a prior particular statute, or particular provisions of a prior statute, unless negative words are used, or unless there be an invincible repugnancy between the two. The more specific provision controls the general, without regard to their order and dates. The two acts are interpreted as operating together, the specific provisions furnishing exceptions and qualifications to the general rule."

An amendatory statute providing only for the distribution of the penalty for a public offense in a manner different from that directed by the

On the other hand, if the two acts are so inconsistent that they cannot stand together, the earlier act is impliedly repealed.[201] And the

original act does not affect the offense defined by the previous act, or work a repeal of the penalty. State v. Wilbor, 1 R. I. 199, 36 Am. Dec. 245.

In People v. Gustin, 57 Mich. 407, the court recognized the rule that repeals by implication are not favored, and held that a statute punishing the keeping of a house of ill fame was not impliedly repealed by a statute relating to "disorderly persons," and providing a different punishment for offenders of that class, among whom were enumerated "keepers of bawdy houses, or houses for the resort of prostitutes."

In Thompson v. State, 60 Ark. 59, it was held that a statute providing that the conversion of unmarked or unbranded cattle, hogs, or sheep over 12 months old, and running at large, should not be larceny, was not impliedly repealed by a subsequent statute providing that every person who should steal any kind of cattle, pigs, hogs, sheep, or goats should be guilty of a felony. The latter, said the court, is a general affirmative statute, without negative words, and its effect was to abolish the distinction as to the subjects enumerated in the act that had existed between grand and petit larceny. There does not seem to be an invincible repugnancy between it and the former act, and therefore both should stand.

[201] Shannon v. People, 5 Mich. 71, 84; Flaherty v. Thomas, 12 Allen, 428; Sullivan v. People, 15

same is true when a later act undertakes to cover the whole subject matter of an earlier act.[202]

The reason for holding that a statute is impliedly repealed by a later inconsistent statute is because it is inferred that the legisla-

---

Ill. 233. And see Miller v. State, 33 Miss. 361, 69 Am. Dec. 351; State v. Dolan, 93 Mo. 467; Homer v. Com., 106 Pa. St. 221, 51 Am. Rep. 521; Johns v. State, 78 Ind. 332, 41 Am. Rep. 577.

Thus, there are any number of cases holding that a statute imposing a different punishment for the same offense as is punished by a former statute impliedly repeals it, at least in so far as the punishment is concerned. See Com. v. McDonough, 13 Allen (Mass.) 581; People v. Sponsler, 1 Dak. 289; People v. Tisdale, 57 Cal. 104.

[202] "Where a subsequent statute covers the whole ground occupied by an earlier statute, it repeals, by implication, the former statute, though there may be no repugnance." Com. v. Cooley, 10 Pick. (Mass.) 37. And see U. S. v. Tynen, 11 Wall. (U. S.) 88; Com. v. Marshall, 11 Pick. (Mass.) 350, 22 Am. Dec. 377, Beale's Cas. 5; Shannon v. People, 5 Mich. 71, 85; People v. Sponsler, 1 Dak. 289; Andrews v. People, 75 Ill. 605.

In U. S. v. Tynen, 11 Wall. (U. S.) 88, it was held that a statute which embraced all the provisions of a former statute on the same subject, and also contained new provisions, and which imposed different and additional penalties, operat-

ture intended a repeal. Apparent or real inconsistency between acts is not sufficient ground for holding that the first is impliedly repealed by the second, if it clearly appears that there was no such intention on the part of the legislature.[203]

51. Implied Repeal of the Common Law.

The same principles apply for the purpose of determining whether a statute impliedly repeals a rule or principle of the common law. As a general rule, there is no repeal if there is no repugnancy between the common law and the statute.[204] But the common law is re-

---

ed as a repeal of the earlier statute, without any repealing clause.

[203] Cain v. State, 20 Tex. 355.

[204] State v. Ellis, 33 N. J. Law, 102, 97 Am. Dec. 707; State v. Pulle, 12 Minn. 164.

A statute defining and punishing bribery of judicial officers only does not abrogate or repeal the common law as to bribery of other officers. State v. Ellis, supra.

"A statute which is clearly repugnant to the common law must be held as repealing it, for the last expression of the legislative will must prevail. Or we may admit * * * that when a new statute covers the whole ground occupied by a previous one, or by the common law, it repeals, by implication, the prior law, though there is no repugnancy. Beyond this, the authorities do not

pealed if there is an irreconcilable repugnancy, or if the legislature has undertaken to revise and cover the whole subject matter, and, in the latter case, inconsistency between the statute and the common law is not necessary.[205]

---

go in sustaining a repeal of the common law by implication. On the contrary, it is well settled that where a statute does not especially repeal or cover the whole ground occupied by the common law, it repeals it only when and so far as directly and irreconcilably opposed in terms." State v. Pulle, 12 Minn. 164.

[205] Com. v. Cooley, 10 Pick. (Mass.) 37; Com. v. Dennis, 105 Mass. 162; Estes v. Carter, 10 Iowa, 400; State v. Boogher, 71 Mo. 631.

In Com. v. Dennis, supra, the prosecution was for attempt to commit suicide, which was a misdemeanor at common law. It appeared that the Massachusetts legislature had undertaken to cover the subject of attempts by statute, the degree of punishment being measured by the character of the offense attempted, and the punishment attached to it. All offenses punishable by death, imprisonment, and fine were included, and no others. It was held that the common law as to attempts to commit suicide was repealed, and that such attempts were no longer indictable, since suicide could never be punished in either of the ways specified.

And in Com. v. Cooley, supra, it was held that a statute containing a series of provisions in

When a statute creates a new offense, and prescribes a particular penalty and mode of enforcing it, the statute, of course, must be followed; but if the offense was before punishable at common law, the common-law remedy still remains, though the statute may prescribe a new remedy, unless there are negative words in the statute excluding all other remedies. "That affirmative statutes do not take away the common law is a maxim of the law itself."[206]

52. Effect of Expiration or Repeal.

When a law has expired or been repealed absolutely, it no longer has any operation, and it is well settled, therefore, that a person cannot be prosecuted for an offense after the law under which it was punishable has expired or been repealed without a saving clause, although the offense may have been committed when the law was in full force.[207] Even

---

relation to the whole subject of the disinterment of dead bodies had superseded, and by necessary implication repealed, the rules of the common law on the same subject.

[206] Wetmore v. Tracy, 14 Wend. (N. Y.) 250, 28 Am. Dec. 525; People v. Crowley, 23 Hun (N. Y.) 412.

[207] 1 Hale, P. C. 291; Rex v. McKenzie, Russ.

when there has been a conviction during the existence of the law, no judgment can be rendered after its expiration or repeal.[208] For this reason, it is usual, in repealing laws, to insert a saving clause continuing them in force as to pending prosecutions, and often as to all violations of the law before the repeal.[209] In some states there is a general provision that the repeal of a penal statute shall

---

& R. 429; Com. v. Marshall, 11 Pick. (Mass.) 350, 22 Am. Dec. 377, Beale's Cas. 5; Com. v. McDonough, 13 Allen (Mass.) 581; Keller v. State, 12 Md. 322, 71 Am. Dec. 596; Teague v. State, 39 Miss. 516; Roberts v. State, 2 Overt. (Tenn.) 423; Com. v. Duane, 1 Binn. (Pa.) 601, 2 Am. Dec. 497; Hartung v. People, 22 N. Y. 95, 26 N. Y. 167; State v. Long, 78 N. C. 571; Sheppard v. State, 1 Tex. App. 522, 28 Am. Rep. 422; State v. Mansel, 52 S. C. 468; State v. Lewis (S. C.) 33 S. E. 351.

[208] Keller v. State, 12 Md. 322, 71 Am. Dec. 596; Com. v. Marshall, 11 Pick. (Mass.) 350, 22 Am. Dec. 379, Beale's Cas. 5; Com. v. Kimball, 21 Pick. (Mass.) 373; Com. v. Duane, 1 Binn. (Pa.) 601, 2 Am. Dec. 497; Mahoney v. State, 5 Wyo. 520; Wall v. State, 18 Tex. 682, 70 Am. Dec. 302.

This principle also applies when a law is repealed or expires pending a writ of error or appeal, for the decision must be in accordance with the law at the time of final judgment. Keller v. State, supra; Mahoney v. State, supra.

[209] See Sanders v. State, 77 Ind. 227; Com. v.

not abate a pending prosecution, or prevent a prosecution, for acts previously committed.[210]

53. Repeal of Repealing Law.

As a general rule, in the absence of a statutory provision to the contrary, the repeal of a repealing law revives the pre-existing law. Thus, if a statute should repeal the common law as to murder by defining and punishing it, the simple repeal of the statute would revive the common law. And the same is true of the repeal of a statute which repealed a prior statute. The prior statute is revived.[211] The intention of the legislature, how-

---

Bennett, 108 Mass. 30. A clause in a statute that nothing contained in the statute shall affect "any penalty or forfeiture already incurred under the provisions of any law in force prior to the passage of this act" saves from the operation of the statute any penalty incurred before it took effect, though after its approval by the governor. Com. v. Bennett, supra.

[210] See Com. v. Duff, 87 Ky. 586; Acree v. Com., 13 Bush. (Ky.) 353; McCuen v. State, 19 Ark. 634; State v. Mathews, 14 Mo. 133.

[211] Com. v. Mott, 21 Pick. (Mass.) 492; Com. v. Getchell, 16 Pick. (Mass.) 452; State v. Kent, 65 N. C. 311.

In some jurisdictions it is expressly declared by statute that no act or part of an act repealed by another act shall be deemed to be revived by

ever, must govern; and the repeal of a repealing law will not have this effect if a contrary intention is manifest.[212] Of course, the preexisting law is not revived so as to apply to acts committed when it was not in force.[213]

---

the repeal of the repealing act. See Heinssen v. State, 14 Colo. 228; State v. Slaughter, 70 Mo. 484; Sullivan v. People, 15 Ill. 233.

[212] Com. v. Churchill, 2 Metc. (Mass.) 123; Com v. Marshall, 11 Pick. (Mass.) 350, 22 Am. Dec. 379. Beale's Cas. 5.

[213] Com. v. Marshall, supra.

CHAPTER III.

THE CRIMINAL INTENT AND CAPACITY TO COMMIT CRIME.

I. IN GENERAL, §§ 54–67.
II. IGNORANCE OR MISTAKE OF FACT, §§ 68–72.
III. IGNORANCE OR MISTAKE OF LAW, §§ 73–75.
IV. JUSTIFICATION, §§ 76–84.
V. RESPONSIBILITY OF MARRIED WOMEN, §§ 85–87.
VI. RESPONSIBILITY OF INFANTS, §§ 88–92.
VII. RESPONSIBILITY OF INSANE PERSONS, §§ 93–99.
VIII. RESPONSIBILITY OF DRUNKEN PERSONS, §§ 100–108.
IX. RESPONSIBILITY OF CORPORATIONS, §§ 109–113.
X. CONCURRENCE OF ACT AND INTENT, §§ 114–115.

I. CRIMINAL INTENT IN GENERAL.

54. Necessity for a Criminal Intent.—It is a general rule, applicable both to common-law and to statutory crimes, that there is no crime unless there is a criminal intent. The legislature, however, if it sees fit, may punish acts when the mind is entirely innocent, and on grounds of public policy it has dispensed with the necessity for a criminal intent in some cases.

55. Necessity for Criminal Intent at Common Law.

No principle of the common law is better

settled or more generally applicable than the principle that an act is not a crime if the mind of the person doing the act is innocent. The maxim is, *"actus non facit reum, nisi mens sit rea."* A wrongful act and a wrongful intent must concur.[1] "It is a sacred principle of criminal jurisprudence," said the Tennessee court, "that the intention to commit the crime is of the essence of the crime, and to hold that a man shall be held criminally responsible for an offense, of the commission of which he was ignorant at the time, would be intolerable tyranny."[2] It is because of this principle, as we shall presently see at some length, that the law does not punish children of tender age and insane persons, who, by reason of their mental incapacity, are incapable of understanding the nature of

---

[1] Reg. v. Tolson, 23 Q. B. Div. 168, Beale's Cas. 286; Levet's Case, Cro. Car. 538, 1 Hale, P. C. 474, Beale's Cas. 286; Gordon v. State 52 Ala. 308, 23 Am. Rep. 575; Birney v. State, 8 Ohio, 230, Beale's Cas. 303; Duncan v. State, 7 Humph. (Tenn.) 148; People v. Welch, 71 Mich. 548; Com. v. Weiss, 139 Pa. St. 247, 23 Am. St. Rep. 182; State v. Snyder, 44 Mo. App. 429; and numerous cases hereafter more specifically cited.

[2] Duncan v. State, 7 Humph. (Tenn.) 148.

their acts, or of distinguishing between right and wrong, persons acting in good faith and without negligence under a mistake of fact, and persons acting under necessity or compulsion.

56. Necessity for Criminal Intent in Statutory Offenses.

(*a*) *In General.*—Ordinarily the principle that a criminal intent is a necessary element of crime applies to statutory offenses as well as to offenses at common law,[3] for, as was explained in another chapter, penal statutes are to be construed in accordance with common-law principles, unless the legislature has clearly excluded such construction.[4] The principle, however, is not inflexible in the case of statutory offenses. It is within the power of the legislature, if it sees fit, to dispense with the necessity for a criminal intent, and to punish particular acts without regard

[3] Reg. v. Tolson, 23 Q. B. Div. 168, Beale's Cas. 286; Rider v. Wood, 2 El. & El. 338; Reg. v. Tinkler, 1 Fost. & F. 513, Beale's Cas. 285; Gordon v. State, 52 Ala. 308, 23 Am. Rep. 575; Myers v. State, 1 Conn. 502, Beale's Cas. 302; Stern v. State, 53 Ga. 229, 21 Am. Rep. 266; Duncan v. State, 7 Humph. (Tenn.) 148; Birney v. State, 8 Ohio, 230, Beale's Cas. 303; People v. Welch, 71 Mich. 548.

[4] Ante, § 47 (e).

to the mental attitude of the doer. Because of the difficulty of proving a criminal intent in some cases, or for other reasons, public policy may require the legislature, in prohibiting and punishing certain acts, to provide that any person who shall do the act shall do it at his peril, and shall not be allowed to show in defense that he did not know of the existence of the circumstances rendering the act unlawful. If such an intention on the part of the legislature clearly appears, the courts must give it effect, however harshly the statute may operate in the particular case.[5]

(*b*) *Construction of the Statutes.*—The legislature may dispense with the necessity for a criminal intent either in express terms or impliedly. In the former case there can be no difficulty; but, when the intention of

---

[5] Reg. v. Woodrow, 15 Mees. & W. 404; Halstead v. State, 41 N. J. Law, 552, 32 Am. Rep. 247; Com. v. Farren, 9 Allen (Mass.) 489; Com. v. Mash, 7 Metc. (Mass.) 472, Beale's Cas. 304; Com. v. Boynton, 2 Allen (Mass.) 160, Beale's Cas. 306; Com. v. Wentworth, 118 Mass. 441; Com. v. Connelly, 163 Mass. 539; State v. Kelly, 54 Ohio St. 166; State v. Smith, 10 R. I. 258; State v. Huff, 89 Me. 525; State v. Zichfeld, 23 Nev. 304, overruling State v. Gardner, 5 Nev. 377; People v. Roby, 52 Mich. 577.

the legislature is to be implied, it is often very difficult to say whether a criminal intent is necessary, as at common law, or not. The question, it has been said, "depends upon the subject-matter of the enactment, and the various circumstances that may make the one construction or the other reasonable or unreasonable."[6] It is not surprising that the courts

[6] Per Wills, J., in Reg. v. Tolson, 23 Q. B. Div. 168, Beale's Cas. 286. See also, State v. Kelly, 54 Ohio St. 166, 167; Com. v. Murphy, 165 Mass. 66, 52 Am. St. Rep. 496.

In Halstead v. State, 41 N. J. Law, 552, 32 Am. Rep. 247, it was said: "These two classes of cases, diverging as they do, and seemingly standing apart from each other, may at first view appear to be irreconcilable in point of principle; but, nevertheless, such is not the case. They all rest upon one common ground, and that ground is the legal rules of statutory construction. None of them can legitimately have any other basis. They are not the products of any of the general maxims of civil or natural law. On the contrary, each of this set of cases is, or should have been, the result of the judicial ascertainment of the mind of the legislature in the given instance. In such investigations, the dictates of natural justice, such as that a guilty mind is an essential element of crime, cannot be the ground of decision, but are merely circumstances of weight, to have their effect in the effort to discover the legislative purpose. As there is an undoubted com-

have differed widely in construing the statutes, even when they have been substantially the same, and that in many cases the judges of the same court have differed. In construing a statute the court should not hold that it dispenses with the necessity for a criminal intent unless such an intent on the part of the legislature is clear beyond any reasonable doubt.[7]

---

petency in the lawmaker to declare an act criminal, irrespective of the knowledge or motive of the doer of such act, there can be, of necessity, no judicial authority having the power to require, in the enforcement of the law, such knowledge or motive to be shown. In such instances, the entire function of the court is to find out the intention of the legislature, and to enforce the law in absolute conformity to such intention, and in looking over the decided cases on the subject it will be found that in the considered adjudications this inquiry has been the judicial guide. And naturally, in such an inquiry, the decisions have fallen into two classes, because there have been two cardinal considerations of directly opposite tendency, influencing the minds of judges; the one being the injustice of punishing unconscious violations of law, and the other the necessity, in view of public utility, of punishing, at times, some of that very class of offenses."

[7] See Reg. v. Tolson, 23 Q. B. Div. 168, Beale's Cas. 280; Gordon v. State, 52 Ala. 308, 23 Am. Rep. 575; Duncan v. State, 7 Humph. (Tenn.) 148.

(*c*) *Particular Cases.*—Among the various statutes which some of the courts, but not all, have construed as not requiring a crimi-

---

In Reg. v. Tinkler, 1 Fost. & F. 513, Beale's Cas. 285, where a man was indicted under a statute for the abduction of a girl under sixteen years of age, and it did not appear that he had any improper motive, Chief Justice Cockburn directed the jury that, if they thought he merely wished to have the child live with him, and honestly believed that he had a right to the custody of the child, because of a promise made by him to her father on his death bed, they should acquit him, although he in fact had no such right.

In Reg. v. Tolson, 23 Q. B. Div. 168, Beale's Cas. 286, decided in England in 1889, in the court of appeal, queen's bench division, the statute under which the defendant, a woman, was indicted, provided that any person who, being married, should marry any other person during the life of his or her wife or husband, should be guilty of a felony. There was a proviso that the act should not extend to any person marrying a second time, after the absence of his or her wife or husband for the space of seven years, without being known to such person to have been living within that time. The defendant had married a second time while her husband was living, and before he had been absent for seven years, but it appeared that she believed, and had good reason to believe, that he was dead. She was convicted, notwithstanding the absence of a criminal intent. On appeal, the case was considered by all of the judges, and

nal intent, are statutes punishing bigamy,[8] statutes for the protection of game and fish,[9] statutes punishing public officers for the expenditure of public moneys in excess of appropriations, etc.,[10] statutes punishing the

---

most of them delivered opinions. The majority held that the statute was not to be construed as dispensing with the necessity for a criminal intent, and the conviction was quashed. The minority were of opinion that the legislature intended to absolutely prohibit any person from marrying a second time before the expiration of the seven years, without knowing of the death of his or her former spouse, and that any person so marrying should do so at his or her peril.

[8] Com. v. Mash, 7 Metc. (Mass.) 472, Beale's Cas. 304; State v. Zichfeld, 23 Nev. 304, overruling State v. Gardner, 5 Nev. 377. Contra, Reg. v. Tolson, 23 Q. B. Div. 168, ante. p. 127, note; Squire v. State, 46 Ind. 459. And see post, § 70 (c.)

[9] State v. Huff, 89 Me. 521 (seining for smelts, in violation of a statute).

[10] In New Jersey, a statute punished any member of certain public boards who should disburse or vote for the disbursement of public moneys in excess of appropriations, or incur obligations in excess of appropriations, or the limit of expenditures provided by law, and said nothing at all about the intent. On a prosecution for violation of this statute, it was held that a criminal intent was not necessary, and that the accused was

sale of intoxicating liquors to slaves, [11] or to minors or drunkards, [12] etc. Generally, the cases in which this question arises are cases in which ignorance or mistake of fact is set up as a defense, and these are treated more fully in another place.[13]

57. Ignorance of Law.

There is one real exception, even at common law, to the rule that a criminal intent is an essential element of every crime. This exception is in the case of acts done in unavoidable ignorance of the law prohibiting and punishing them. Every man is conclusively presumed to know the law, and, if he violates the law, he cannot set up his ignorance as a defense, though as a matter of fact it might negative the existence of an actual criminal intent. And it can make no difference how reasonable, or even unavoidable, his ignorance may have been.[14]

---

guilty, though he acted in good faith, under advice of counsel, and with due care and caution.

Halstead v. State, 41 N. J. Law, 552, 32 Am. Rep. 247.

[11] State v. Presnell, 12 Ired. (N. C.) 103, Beale's Cas. 177.

[12] Post, § 70 (b).

[13] Post, § 70 et seq.

[14] Post, § 73 et seq.

58. Criminal Intention Presumed from Act.

It is a general rule that every man of sufficient mental capacity to know what he is doing is presumed to have intended the natural or probable consequences of his voluntary acts. This rule has repeatedly been applied in the criminal law, and to a great variety of cases. If a man voluntarily, and without any mistake as to the facts, does an act which, according to the natural course of events, will probably injure another in a particular way, it will be presumed, in the absence of evidence to the contrary, that he intended such consequences.[15]

Conclusive Presumption.—In many cases a criminal intention will be conclusively presumed from voluntary acts.[16]

Common Law.—Thus, where a man uses

[15] Com. v. Hersey, 2 Allen (Mass.) 173, Beale's Cas. 183; Reynolds v. U. S., 98 U. S. 145, Beale's Cas. 179; Dunaway v. People, 110 Ill. 333, 51 Am. Rep. 686; State v. Gilman, 69 Me. 163, 31 Am. Rep. 260; State v King, 86 N. C. 603; Hood v. State, 56 Ind. 263, 26 Am. Rep. 21; State v. White Oak River Corp. 111 N. C. 661.

[16] "Where an act, in itself indifferent, if done with a particular intent becomes criminal, the intent must be proved and found; but where the act is in itself unlawful, the proof of justification or excuse lies on the defendant, and, in failure thereof, the law implies a criminal intent." Per Lord

language towards another which is calculated to bring on an affray, and engages in a fight when the other assaults him, he cannot, on a prosecution for an affray, be heard to say that he did not intend to bring about a breach of the peace.[17] So, if a person deliberately, and without ignorance of fact, shoots in the direction of another, it will be presumed that he intended to kill him, and he may be convicted of murder, or assault with intent to murder, according to the circumstances.[18]

Violation of Statutes.—If a statute prohibits an act under certain circumstances, and a person does the act, not under any mistake of fact, a criminal intention is conclusively presumed.[19]

Mansfield in Rex. v. Woodfall, 5 Burrows 2667. See, also, State v. Welch, 21 Minn. 22.

[17] State v. King, 86 N. C. 603.

[18] Dunaway v. People, 110 Ill. 333, 51 Am. Rep. 686; Walker v. State, 8 Ind. 290; State v. Gilman, 69 Me. 163, 31 Am. Rep. 260; post, §§ 208, 244.

[19] Com. v. Connelly, 163 Mass. 539; State v. McLean, 121 N. C. 589; State v. White Oak River Corp., 111 N. C. 661.

Thus, if a person, in violation of a statute, intentionally opens a grave for the purpose of removing anything interred therein, a criminal intent is conclusively presumed. State v. McLean, supra.

59. Responsibility for Unintended Results.

(*a*) *In General.*—To constitute a criminal intent, so as to render a person responsible for the results of his acts, it is not always necessary that he shall have intended the particular results for which he is punished. If his intention was not innocent, he may in many cases be held criminally responsible for results that were clearly not contemplated.

(*b*) *Intention to Commit a Crime.*—If a person intends to commit one offense, and by reason of mistake of fact, or for any other reason, commits another, he may in many cases be punished for the latter.[20] There is no injustice in this. Thus, a man who shoots and kills a person, thinking he is some one else, is guilty of the murder of the person killed.[21] So, it is murder to unintentionally kill another, while engaged in the commission of

---

And so it is where a carrier discriminates in the transportation of passengers or goods, in direct violation of a statute. State v. Southern Ry. Co., 122 N. C. 1052.

[20] See State v. Ruhl, 8 Iowa, 447. And see post, § 71.

[21] Reg. v. Smith, 33 Eng. Law & Eq. 567; State v. Smith, 2 Strob. (S. C.) 77, 47 Am. Dec. 589, Beale's Cas. 468; Angell v. State, 36 Tex. 542, 14 Am. Rep. 380; post, § 241 (b).

some felony.[22] And it is manslaughter to unintentionally kill a person in committing an assault and battery.[23] Many other illustrations might be given.[24]

(*c*) *Immoral Acts.*—A criminal intent may also be imputed to a man because of an intention to do an immoral act. Thus, if a person has unlawful intercourse with a woman who is married, he is none the less guilty of adultery because he does not know that she is married.[25] And there are many other cases.[26]

(*d*) *Consequences not Natural or Probable.*—A person is not liable criminally for all possible consequences which may immediately follow his wrongful act, but only for such as are natural and probable. For this reason,

---

[22] Reg. v. Greenwood, 7 Cox, C. C. 404, Beale's Cas. 424; post, § 248.

[23] Reg. v. Towers, 12 Cox, C. C. 530, Beale's Cas. 425; post, § 263.

[24] See Rex v. Conner, 7 Car. & P. 438; Rex v. Brown, 1 Leach, C. C. 148; Reg. v. Lynch, 1 Cox, C. C. 361; Barcus v. State, 49 Miss. 17, 19 Am. Rep. 3; McGehee v. State, 62 Miss. 772, 52 Am. Rep. 210; Dunaway v. People, 110 Ill. 333, 51 Am. Rep. 686; Callahan v. State, 21 Ohio St. 306.

[25] Post, § 71 (b).

[26] Post, § 71 (b).

where a man struck another with his fist and knocked him down, and a horse then jumped upon him and killed him, it was held that the assailant was not responsible for the death, and could not be convicted of manslaughter.[27]

(*e*) *Acts Merely Mala Prohibita and Mere Civil Wrongs.*—As will be shown in another place, the principle that a man is criminally responsible for results not intended by him, if engaged in an unlawful act, does not apply where the act is merely *malum prohibitum*, and not otherwise wrong.[28] Nor does it apply where the act is a mere civil wrong, and neither a crime nor immoral, as where it is a mere civil trespass upon land or goods.[29]

60. Willfulness.

The common meaning of the term "willful" is "voluntary; due to one's own will; intentional."[30] An act, to be willful, must be voluntary. In penal statutes, and in the criminal law generally, the term does not always mean an evil or corrupt intent. Thus, where

---

[27] People v. Rockwell, 39 Mich. 503. And see post, § 236.

[28] Post, § 71 (c).

[29] Post, § 71 (d).

[30] Cent. Dict. & Eyc. "Willful."

a statute punished any person who should "willfully" obstruct a highway, it was held that the term applied where a highway was intentionally obstructed without reasonable grounds to believe the obstruction to be lawful, and that it was no defense that the accused was acting under the orders of a superior officer of a railroad company, and without any evil intent.[31]

Generally, however, the term "willful" does mean something more than voluntary or intentional. It implies a guilty mind. It implies, at least, that the act is done without justification or excuse, and it generally implies, to some extent, an evil mind or intent.[32] Thus, when used in a penal statute in

---

[31] Sanders v. State, 31 Tex. Cr. R. 525; Sneed v. State, 28 Tex. App. 56.

In State v. Clark, 102 Iowa, 685, it was held that whether the refusal of a vote by election officers was with or without just grounds for believing the refusal to be lawful was altogether immaterial in determining whether the refusal was "willful," within a statute making officers of election guilty of a misdemeanor in "willfully" refusing the vote of a person who should comply with the requisites prescribed by law to prove his qualifications.

[32] Felton v. U. S., 96 U. S. 699; State v. Preston, 34 Wis. 675; City of Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 246; U. S. v. Three

reference to a person who shall neglect or fail to discharge a duty or perform an act enjoined, the term implies that the party shall have the ability to discharge the duty or perform the act. A person who is unable to comply with a statute because of physical or financial inability to do so is not guilty of "willfully" violating it.[33] Among other statutes in which the term "willful" has been construed as meaning something more than voluntary or intentional are statutes punishing the willful killing of another's animals,[34] the willful mu-

Railroad Cars, 1 Abb. U. S. 196, Fed. Cas. No. 16, 513; Com. v. Kneeland, 20 Pick. (Mass.) 206, 220; Thomas v. State, 14 Tex. App. 200; State v. Abram, 10 Ala. 928; McManus v. State, 36 Ala. 285.

[33] City of Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 246.

[34] In a Texas case, where the defendant was charged under a statute with willfully and wantonly killing another's sheep, and it was claimed in defense that he killed them to prevent them from injuring his own property, it was held that this might be a good defense. The court said: "Of course he killed them intentionally, but it is not every intentional act that is a willful or wanton act. When used in a penal statute, the word "willful" means more than it does in common parlance. It means with evil intent, or legal malice, or without reasonable ground for believing the act to be lawful. In common parlance, it is used in

tilation of a person,[35] or the willful obstruction of a highway,[36] and statutes punishing

---

the sense of "intentional," as distinguished from "accidental" or "involuntary." To make the killing of the sheep, therefore, a willful act, it must have been committed with an evil intent, with legal malice, and without legal justification. To make the killing a wanton act, it must have been committed regardless of the rights of the owner of the sheep, in reckless sport, or under such circumstances as evinced a wicked or mischievous intent, and without excuse." Thomas v. State, 14 Tex. App. 200.

[35] State v. Abram, 10 Ala. 928.

[36] Thus, in State v. Preston, 34 Wis. 675, it was held that the willful obstruction of a highway, for which a penalty was provided by statute, did not include the case of an obstruction created in good faith by a landowner, believing that no highway existed at the place, and acting under the advice and direction of the town supervisors, who were charged by law with the general direction and control of highways in the town. The court said in this case: "It is contended that the term "willfully," as here used, signifies no more than "voluntarily" or "purposely," thus distinguishing the act of obstructing made penal from one which may be said to have been accidental, which last alone it was the design of the statute not to punish. The word "willfully," as used to denote the intent with which an act is done, is undoubtedly susceptible of different shades of meaning or degrees of intensity, according to the context and evident pur-

willful homicide,[37] willful blasphemy,[38] willful voting by a person not qualified to vote,[39] etc.

61. Wantonness.

A wanton act is something more than a willful act. It has been defined to be an act committed in disregard of the rights of others, in a reckless spirit, or under circumstances which evince a lawless, wicked, or mischievous intent.[40]

62. Malice.

(*a*) *In General.*—In its popular sense, the term "malice" means hatred, ill-will, or hostility to another, but this is not necessarily its meaning in law. In its broadest legal sense it is almost, if not quite, synonymous with "criminal intent," and means the state

---

pose of the writer. It is sometimes so modified and reduced as to mean little more than plain "intentionally" or "designedly." Such is not, however, its ordinary signification when used in criminal law and penal statutes. It is there most frequently understood, not in so mild a sense, but as conveying the idea of legal malice in greater or less degree,—that is, as implying an evil intent without justifiable excuse."

[37] McManus v. State, 36 Ala. 285.

[38] Com. v. Kneeland, 20 Pick. (Mass.) 206, 220.

[39] Com. v. Bradford, 9 Metc. (Mass.) 268.

[40] Thomas v. State, 14 Tex. App. 200.

of mind of a person, irrespective of his motive, whenever he consciously violates the law. In this broad sense, every person who is *sui juris,* and who, without justification or excuse, willfully does an act which is prohibited and made punishable by law as a crime, does the act maliciously.[41] Malice, in its legal sense, said Chief Justice Shaw, "characterizes all acts done with an evil disposition, a wrong and unlawful motive and purpose; the willful doing of an injurious act without lawful excuse."[42] Malice includes the idea of

---

[41] Rex v. Harvey, 2 Barn. & C. 268; Com. v. Snelling, 15 Pick. (Mass.) 337; Com. v. York, 9 Metc. (Mass.) 93; State v. Grassle, 74 Mo. App. 313; Hollander v. State, 12 Fla. 117; Gallagher v. State, 28 Tex. App. 247; Powell v. State, 28 Tex. App. 393.

[42] Com. v. York, 9 Metc. (Mass.) 93.

In Com. v. Snelling, 15 Pick. (Mass.) 337, 340, it was said by Chief Justice Shaw, in a prosecution for criminal libel: "In a legal sense, any act done willfully and purposely to the prejudice and injury of another, which is unlawful, is, as against that person, malicious. It is not necessary, to render an act malicious, that the party be actuated by a feeling of hatred, and pursue any general bad purpose or design. On the contrary, he may be actuated by a general good purpose, and have a real and sincere design to bring about a reformation of manners; but if, in pursuing that design, he

willfulness. An act, to be malicious, must be done willfully.[43]

In penal statutes the terms "malice" and "malicious" are often used in this broad sense, rather than as denoting any ill-will or any specific intent to injure. Thus, under a statute punishing any person who should "willfully and maliciously" place any obstruction on a railroad track, a person who placed an obstruction on the track for the purpose of obtaining a reward from the railroad company by giving notice of the obstruction was held guilty, though he intended to and did signal and stop a train so as to prevent injury.

---

willfully inflicts a wrong on others, which is not warranted by law, such act is malicious. A man may, by his example and by his conduct, be doing great injury to society. He may, in fact, be guilty of the most ruinous crimes, and that well known to an individual; that individual may be actuated by the most pure and single-hearted desire to rid society of so mischievous a character, and entertain the firmest conviction that he would be doing great good by it; and yet it is very certain that, in contemplation of law, any attempt upon his life, his liberty, his person, or property, made in the accomplishment of such a purpose, would be unlawful, and therefore malicious."

[43] State v. Robbins, 66 Me. 324.

It was held that it was not necessary that he should intend to injure any one.[44]

(*b*) *Wrongful Intent Necessary.*—It must not be supposed from what has been said that there can be malice where the mind is entirely innocent. The term not only implies willfulness, but it also implies a *wrongful* intent at least; a man may act willfully in the sense of voluntarily, and yet the circumstances may be such as to excuse him. In such a case he does not act maliciously. The act must be done without lawful excuse.[45] Thus, a person who acts in ignorance of the facts which render his act unlawful, and without negligence, the act not being *malum in se*, cannot be said to act with malice, in any sense of the word.[46] And so it is if a man acts in necessary defense of his person or property.[47]

(*c*) *Reckless and Wanton Acts.*—In some cases malice may be inferred or implied as a matter of law, and independent of the actual intent, from reckless and wanton acts likely

[44] Crawford v. State, 15 Lea (Tenn.) 343.

[45] Holland v. State, 12 Fla. 117; Powell v. State, 28 Tex. App. 393.

[46] Post, § 68 et seq.

[47] Post, § 80.

to cause injury. Thus, the malice necessary to constitute murder may be implied from the reckless or wanton use of a deadly weapon.[48] And the same is true of other offenses.[49] "Barbarity," said Lord Holt, "will often make malice."[50]

(*d*) *Restricted Sense of "Malice."*—The terms "malice" and "malicious" are not always used in their broadest sense, as above explained. In relation to some crimes, both at common law and under statutes, they have a narrower meaning. Thus, as applied to the offense of malicious mischief, they mean, not merely a mere wrongful trespass, but they are used in the sense of resentment or ill-will towards the owner of the property injured or destroyed, or wantonness at least.[51] They

---

[48] Grey's Case, J. Kelyng, 64, Beale's Cas. 463; State v. Smith, 2 Strob. (S. C.) 77, 47 Am. Dec. 589; post, §§ 244, 245.

[49] Com. v. Walden, 3 Cush. (Mass.) 558. Thus, where a man recklessly shot at another's cattle to run them off his premises, and killed one of them, it was held that malice should be implied. State v. Barnard, 88 N. C. 661.

[50] Keate's Case, Comb. 408.

[51] Post, § 391. In Com. v. Walden, 3 Cush. (Mass.) 558, which was a prosecution for malicious mischief under a Massachusetts statute, the

also have a particular meaning as applied to murder,[52] and arson,[53] and to many other offenses.[54]

(*e*) *Express and Implied Malice.*—Malice is divided into express and implied malice.

---

trial court defined the word "maliciously" in the statute to mean "the willful doing of any act prohibited by law, and for which the defendant had no lawful excuse," and told the jury that it was not necessary to show "moral turpitude" of mind. The appellate court held that this was erroneous. "If this definition of the crime charged were correct," it was said, "it would follow that the words 'willfully and maliciously' were intended by the legislature to be understood as synonymous, and that the statute is to be construed in the same manner as it would be if the word 'maliciously' had been omitted. Such a construction, we are of the opinion, cannot be sustained; for, if it could be, it would follow that a person would be liable to be punished for every trespass, however trifling the injury might be, to the personal property of another, which could not be justified or excused in a civil action against him, for the recovery of damages, by the owner. * * * The jury should also have been instructed that, to authorize them to find the defendant guilty, they must be satisfied that the injury was done either out of a spirit of wanton cruelty or wicked revenge. 'Malicious michief,' amounting to a crime, is so defined by Blackstone (4 Bl. Comm. 244), and in Jacob's Law Dictionary, by Tomlin, under the title 'Mischief,

Express malice is actual malice, or malice in fact, and exists when a person actually contemplates the injury or wrong which he inflicts,—as where a man shoots at another with the intent to kill him.[55] Implied malice, otherwise called constructive malice, or malice in law, is where the law implies or imputes malice because of the nature of the act done, and irrespective of the actual intent of the party.[56] Thus, the malice which is an

---

Malicious,' and we have no doubt that such is the true definition of the crime." See, also, Rex v. Kelly, 1 Craw. & D. 186, Beale's Cas. 182.

[52] Post, § 240.

[53] Post, § 415.

[54] See U. S. v. Three Railroad Cars, 1 Abb. U. S. 196, Fed. Cas. No. 16,513.

[55] Darry v. People, 10 N. Y. 120; People v. Clark, 7 N. Y. 393; Anthony v. State, 21 Miss. 264; post, §§ 240(c), 241.

[56] Darry v. People, 10 N. Y. 120; post, §§ 240 (c), 242, et seq.

In the case just cited it was said by Judge Selden: "There is no difference in the nature or degree of the malice intended, whether it be called 'express' or 'implied,' when these terms are used in their most appropriate sense. If properly applied, they refer only to the evidence by which the existence of malice is established. Both alike, the one no less than the other, mean actual malice,—malice shown by the proof to have really existed. It is called 'implied malice' when it is inferred

essential element of murder is implied from the deliberate use of a deadly weapon, without justification or excuse, from the fact that the accused, when he committed the homicide, though it was committed unintentionally, was engaged in resisting a lawful arrest, or in committing some other felony, or from a wanton or reckless act dangerous to life.[57]

63. Specific Criminal Intent.

(*a*) *In General.*—In some crimes a spe-

---

from the naked fact of the homicide, and 'express' when established by other evidence. That this is the true original meaning of these terms, when used in connection with this crime, is apparent, I think, from the natural import of the words themselves, as well as from their accustomed use in other branches of the law. They are appropriate terms to express different modes of proof, and are habitually used for that purpose, but are not adapted to the description of different degrees of malicious intent. The phrase 'implied malice' is properly applied to a case where the evidence shows that the accused did the act which caused the death, but where there is no other proof going to show the existence or the want of malice. In such cases, the law does not impute a malicious intent, irrespective of its real existence, but it presumes, in accordance with the settled rules of evidence, that such an intent did actually exist." Darry v. People, 10 N. Y. 120, 136, 137.

[57] Post, § 242 et seq.

cific intent is an essential ingredient, and no other intent will suffice. On a prosecution for such an offense, the state must affirmatively prove this particular intent, or facts from which it may be inferred.[58]

Illustrations.—Thus, to constitute a burglary, the breaking and entering of the house must be with the specific intent to commit a felony, and this intent must be shown as a fact.[59] Arson is the willful and malicious burning of another's house, and requires an intention to burn. The crime is not committed by one who burns another's house unintentionally, though he may at the time be engaged in the commission of some other felony.[60] In larceny and robbery there must be a specific intent to permanently deprive the owner of the goods of his property therein. No other intent will do.[61] In malicious mis-

---

[58] Dobb's Case, 2 East, P. C. 513, Beale's Cas. 181; Maher v. People, 10 Mich. 212, 81 Am. Dec. 781; Hairston v. State, 54 Miss. 689, 28 Am. Rep. 392; State v. King, 86 N. C. 603; Coleman v. People, 58 N. Y. 555; Reagan v. State, 28 Tex. App. 227, 19 Am. St. Rep. 833.

[59] Dobb's Case, 2 East, P. C. 513, Beale's Cas. 181; Price v. People, 109 Ill. 109; post, § 407.

[60] Post, § 415.

[61] Post, §§ 326 et seq., 378.

chief there must be a willful and malicious injury to the property of another. The offense is not committed by one who unintentionally injures another's property while attempting to commit some other wrong.[62]

In every prosecution for an attempt to commit a crime, it must be shown that the accused intended to commit that particular crime.[63] And to sustain an indictment charging an assault with intent to murder, to rape, or to rob, etc., a specific intent to murder, rape, or rob must be shown.[64]

---

[62] Rex v. Kelly, 1 Craw. & D. 186, Beale's Cas. 182; Com. v. Walden, 3 Cush. (Mass.) 558; post, § 391.

[63] Rex v. Davis, 1 Car. & P. 306; Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1; Sharp v. State, 19 Ohio, 379; Reagan v. State, 23 Tex. App. 227, 19 Am. St. Rep. 833; post, § 121.

[64] Hairston v. State, 54 Miss. 689, 28 Am. Rep. 392; Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1; People v. Keefer, 18 Cal. 636; Barcus v. State, 49 Miss. 17, 19 Am. Rep. 1; Chrisman v. State, 54 Ark. 283, 26 Am. St. Rep. 44; post, § 208.

In Rex v. Boyce, 1 Mood. C. C. 29, Beale's Cas. 182, a burglar was indicted under a statute for feloniously cutting and maiming a man, "with intent to murder, maim, and disable" him. The jury found that he struck with a crowbar a watchman in the house into which he had broken, but

(*b*) *May be Inferred from Act.*—When a specific intent is necessary, it need not necessarily be shown by direct or positive evidence, but it may be inferred from the circumstances. The principle that a man is presumed to have intended the natural and probable consequences of his acts applies.[65] The inference, however, is one of fact, and may be rebutted.

Thus, on a prosecution for burglary, if it be shown that the accused broke into the house, and then committed larceny therein, it may be inferred that he broke and entered with intent to steal.[66] And on a prosecution for shooting or beating another with a deadly weapon with intent to kill, or for administering poison with such intent, the specific intent to kill may be inferred from the use of the deadly weapon or the administering of the poison.[67] On the same principle, an intent to

that he did so only with intent to produce a temporary disability, until he could escape. It was held that he was not guilty under the statute. See post, § 208.

[65] Com. v. Hersey, 2 Allen (Mass.) 173, Beale's Cas. 183.

[66] State v. Squires, 11 N. H. 37; post, § 407 (c).

[67] Com. v. Hersey, 2 Allen (Mass.) 173, Beale's Cas. 103; post, § 208.

defraud a particular person will be inferred from a forgery or the utterance of a forged instrument, if such is the necessary effect of the forging or uttering.[68]

64. Motive.

It is a clear principle of law that motive does not enter into any crime as an essential ingredient. Neither failure to prove any motive nor proof of a good motive will prevent a conviction.

(*a*) *Absence of Motive.*—The absence of any motive for a crime, as in the case of homicide, for example, may be considered by the jury as a matter of evidence in determining whether the accused did the act charged, or whether he acted willfully or maliciously; but if it otherwise appear to their satisfaction that he did do the act, and that he did it willfully and without justification or excuse, the fact that no motive is shown is altogether immaterial.[69]

---

[68] Rex v. Sheppard, Russ. & R. 169, Beale's Cas. 174; post, § 397.

[69] State v. Coleman, 20 S. C. 441; State v. Workman, 39 S. C. 151; State v. Miller, 9 Houst. (Del.) 564; Johnson v. U. S., 160 U. S. 546; People v. Feigenbaum, 148 N. Y. 636.

"Proof of motive is not essential to conviction

(*b*) *Good Motive.*—Even when a motive does appear, it need not necessarily be a bad motive. A willful act prohibited and made punishable by the common law or by statute is none the less a crime because the accused was actuated by a good motive.[70] This is certainly the general rule, though there are some cases in which it appears to have been ignored. For example, on a prosecution for depositing in the mails or publishing an obscene article or book it is no defense for the accused to show that his object was to correct evils and abuses in intercourse between the

in any case, nor can it be said in any case that absence of such proof is ground for acquittal. Its existence is a circumstance to be considered by the jury in determining guilt or innocence, along with all the other evidence adduced, and the nonexistence of proof of it is likewise a circumstance which the jury may consider, along with the other evidence, in reaching a conclusion of innocence; but neither its presence nor absence can of itself be justly said to control the finding of the jury. Crimes may be, and frequently are, thoroughly established without any evidence of motive, and the very absence of motive may aggravate the offense." Stone v. State, 105 Ala. 60.

[70] U. S. v. Harmon, 45 Fed. 414, Beale's Cas. 180; Reynolds v. U. S., 98 U. S. 145, Beale's Cas. 179; Specht v. Com., 8 Pa. St. 312; Stone v. State, 105 Ala. 60; State v. White, 64 N. H. 48 .

sexes, and thus do a public good.[71] And on a prosecution for a nuisance in erecting a wharf on public property it is no defense to show that it has been in fact beneficial to the public.[72] Many other cases might be cited.[73]

65. Religious Belief.

Since a good motive is no excuse, if a man of sound mind does an act which he knows is prohibited and punished by law, he cannot escape responsibility on the ground that he acted because of and in accordance with his religious belief or scruples. Thus, a man cannot set up his religious belief to escape liability for violation of a statute prohibiting and punishing bigamy and polygamy,[74] or

[71] U. S. v. Harmon, supra. And see Reg. v. Hicklin, L. R. 3 Q. B. 360, 11 Cox, C. C. 19; post, § 467.

[72] Respublica v. Caldwell, 1 Dall. (Pa.) 150, Beale's Cas. 177; post, § 456 (c).

[73] In Reg. v. Sharpe, 1 Dears. C. C. 160, 7 Cox, C. C. 214, Beale's Cas. 175, a son was indicted for disinterring the body of his mother, who had been buried in a dissenting congregation's burying grounds, and it was held that the fact that he acted from motives of affection and religious duty, and intended to bury her with his father in other burying grounds, was no defense.

[74] Reynolds v. U. S., 98 U. S. 145, Beale's Cas. 179.

punishing labor on Sunday,[75] or the disinterring of a dead body,[76] or the beating of a drum in the streets of a town.[77]

It has been held in England that the parent of a sick child, who, though able, willfully fails to call in a physician or furnish proper medicine, by reason of which the child dies, is not guilty of manslaughter if his failure is because of religious scruples, or because of a conscientious belief in the faith cure, and the like.[78] This decision, however, is not sound even at common law, and there is now a statute to the contrary.[79]

66. Repentance and Change of Intent.

If an act is done with a criminal intent, no subsequent repentance and change of intent can relieve it of its criminality. Thus, a person who has broken and entered a house with intent to commit a felony is none the less guilty of burglary because he repents and

---

[75] Specht v. Com., 8 Pa. St. 312.

[76] Reg. v. Sharpe, 1 Dears. C. C. 160, 7 Cox, C. C. 214, Beale's Cas. 175.

[77] Like the members of the Salvation Army. State v. White, 64 N. H. 48.

[78] Reg. v. Wagstaffe, 10 Cox, C. C. 530.

[79] See Reg. v. Downes, 1 Q. B. Div. 25, 13 Cox. C. C. 111, Beale's Cas. 195. And see post, § 265(d).

abandons his purpose, since the breaking and entry with such intent constitutes the offense.[80] A person who has committed larceny or robbery cannot escape responsibility by repenting and abandoning or returning the property, or paying for it.[81] A person who, with intent to commit a crime, has done enough to render him guilty of an attempt, can be punished for the attempt, though he afterwards abandoned his purpose.[82] Many other illustrations might be given.

67. Negligence.

A criminal intent, and even malice, may be inferred, as a matter of fact or as a matter of law, from negligence.[83]

(*a*) *Negligent Acts of Commission.*—Thus, negligence in doing a lawful act, by which another is injured, may render a person guilty of criminal assault and battery.[84]

---

[80] Post, § 408.

[81] Post, § 333. See Shultz v. State, 5 Tex. App. 390.

[82] Post, § 126.

[83] Fost. C. L. 262, Beale's Cas. 185; Reg. v. Instan [1893] 1 Q. B. 450, Beale's Cas. 198; U. S. v. Thompson, 12 Fed. 245; and cases more specifically cited in the notes following.

[84] Post, § 204 et seq.

And there are any number of cases in which persons have been held guilty of manslaughter, which is a felony, because of negligence in doing an act which would have been lawful except for the negligence, as in the case of immoderate correction of a child by his parent, negligent use of drugs and negligent surgical operations by unskillful and incompetent practitioners, negligent driving, negligence in shooting at a mark or otherwise using a deadly weapon, etc.[85] Even the malice necessary to constitute murder may be implied from negligence, as from reckless and wanton conduct dangerous to life.[86]

(*b*) *Omission to Act.*—In like manner a criminal intent, and even malice, may be inferred from omission to act at all when there

---

[85] Fost. C. L. 262, Beale's Cas. 185; Reg. v. Lowe, 3 Car. & K. 123, 4 Cox, C. C. 449, 1 Ben. & H. Lead. C. C. 60, Beale's Cas. 192; Reg. v. Chamberlain, 10 Cox, C. C. 486, Beale's Cas. 187; Reg. v. Salman, 14 Cox, C. C. 494, Beale's Cas. 189; State v. Hardie, 47 Iowa, 647, 29 Am. Rep. 496; State v. Emery, 78 Mo. 77, 47 Am. Rep. 92; People v. Fuller, 2 Park. Cr. R. (N. Y.) 16; post, §§ 262-265.

[86] Fost. C. L. 262, Beale's Cas. 185; Reg. v. Marriott, 8 Car. & P. 425; post, § 244.

is a duty to act.[87] Thus, a person may be guilty of manslaughter if he causes the death of another by negligent omission to ventilate a mine, to adjust a switch on a railroad track, or to furnish food or shelter to a helpless person who is dependent upon him.[88] If the omission to act is willful, he will be guilty of murder.[89] To render one criminally liable, however, because of an omission to act, he must be under a legal duty to act,[90] and the omission must be due to culpable negligence.[91]

(*c*) *Offenses Requiring a Specific Intent.*—Mere negligence, whether in commission or omission, is not enough to render a man guilty of a crime of which a specific intent is

---

[87] See Rex v. Friend, Russ. & R. 20, Beale's Cas. 190; Reg. v. Lowe, 3 Car & K. 123, Beale's Cas. 192.

[88] Reg. v. Lowe, 3 Car. & K. 123, Beale's Cas. 192; Reg. v. Hughes, 7 Cox, C. C. 301; Reg. v. Instan [1893] 1 Q. B. 450, Beale's Cas. 198; post, § 265.

[89] See the cases above cited. And see post, § 247.

[90] Reg. v. Smith, 11 Cox, C. C. 210, Beale's Cas. 192; post, § 265(e).

[91] Reg. v. Nicholls, 13 Cox, C. C. 75, Beale's Cas. 193; post, § 265.

an essential element, as in the case of larceny,[92] malicious mischief,[93] arson,[94] attempts to commit crimes,[95] and assaults with intent to murder, to wound, to inflict great bodily harm, etc.[96]

II. IGNORANCE OR MISTAKE OF FACT.

68. In General.—As a general rule, a bona fide and reasonable belief in the existence of facts which, if they did exist, would render an act innocent, is a good defense. But there are both apparent and real exceptions. Thus:

1. **The legislature may punish a person for an act notwithstanding the innocence of his intent, and therefore notwithstanding his ignorance or mistake of fact.**
2. **If a person's intention is criminal, or even wrongful, per se, he may be responsible for results not intended.**
3. **Ignorance or mistake of fact will not exempt one altogether from criminal responsibility, if due to culpable negligence. But this does not apply to an offense which requires a specific evil in-**

---

[92] Post, § 326 et seq.

[93] Reg. v. Pembliton, 12 Cox, C. C. 607, Beale's Cas. 210; post, § 391.

[94] 1 Hale, P. C. 569, Beale's Cas. 208; Reg. v. Faulkner, 13 Cox, C. C. 550, Beale's Cas. 213; post, § 415.

[95] Post, § 121.

[96] Post, § 208.

tent, where the ignorance or mistake of fact negatives the existence of such intent.

69. Mistake of Fact at Common Law.

The general rule that ignorance or mistake of fact is a defense, if not due to culpable negligence, is well settled at common law. It follows necessarily from the principle that an act is not a crime unless there is a criminal intent.[97] *Bona fide* and reasonable mistake of fact stands on the same footing as absence of the reasoning faculty, as in infancy, and perversion of that faculty, as in insanity.[98]

In a leading English case, in which the defendant was indicted for felonious homicide, the evidence showed that he reasonably believed that there was a burglar in his house,

---

[97] Levet's Case, Cro. Car. 538, 1 Hale, P. C. 474, Beale's Cas. 279; Reg. v. Tolson, 23 Q. B. Div. 168, Beale's Cas. 286; Gordon v. State, 52 Ala. 308, 23 Am. Rep. 575; Stern v. State, 53 Ga. 229, 21 Am. Rep. 266; State v. Snyder, 44 Mo. App. 429.

"At common law, an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act, has always been held to be a good defense." Per Cave, J., in Reg. v. Tolson, supra.

[98] Reg. v. Tolson, supra.

and thrusting his sword in the dark, where he thought the burglar was concealed, killed a woman who had come into the house to assist his servant in her work. It was held that the homicide was excusable because of the mistake of fact.[99] On the same principle, if a man kills an assailant under an erroneous but reasonable belief that it is necessary to do so to save his own life, he is excusable.[100] And if a man takes another's property by mistake, and appropriates it to his own use, he is not guilty of larceny.[101]

To render a person guilty of vending obscene or immoral publications, a knowledge of the character of the publications is essential. From the vending it would be inferable, but he would not be criminally responsible if it should appear that because of blindness, or for other reasons, he made the sale innocently and in ignorance of the character of the publication.[102] The same principle applies when a person passes, or has in his

[99] Levet's Case, Cro. Car. 538, 1 Hale, P. C. 474, Beale's Cas. 279.

[100] Campbell v. People, 16 Ill. 17; Steinmeyer v. People, 95 Ill. 383; Marts v. State, 26 Ohio St. 162; post, § 280.

[101] Post, § 327.

[102] Post, § 467.

possession with intent to pass, forged instruments or counterfeit money, in ignorance of their spurious character.[103] Many other illustrations of the rule might be given.[104]

70. Mistake of Fact in Statutory Offenses.

(*a*) *In General.*—As the principle that a criminal intent is necessary generally applies to statutory crimes as well as to crimes at common law,[105] so ignorance and mistake of fact is generally a defense in prosecutions for statutory offenses.[106] The principle, how-

---

[103] Post, §§ 397, 399.

[104] A street-car conductor who forcibly ejects a passenger under a bona fide but mistaken belief that his fare has not been paid is not criminally responsible. State v. McDonald, 7 Mo. App. 510.

And so as to a railroad employe's ejection of an intending passenger from the platform under a reasonable belief that he is there for a prohibited purpose. Com. v. Power, 7 Metc. (Mass.) 596, 41 Am. Dec. 465.

Exposure of unwholesome food for sale is indictable at common law (post, § 447), but not unless the accused knew its character or condition. State v. Snyder, 44 Mo. App. 429.

[105] Ante, § 56.

[106] Anon., Fost. C. L. 439, Beale's Cas. 284; Reg. v. Tolson, 23 Q. B. Div. 168, Beale's Cas. 286; Myers v. State, 1 Conn. 502, Beale's Cas. 302; Birney v. State, 8 Ohio, 230, Beale's Cas. 303; Squire v. State, 46 Ind. 459; Gordon v. State, 52 Ala. 308, 23

ever, as was stated in a previous section,[107] is not inflexible in the case of statutory offenses, for the legislature has the power to dispense with the necessity for a criminal intent, and sometimes does so. Public policy may require the legislature, in prohibiting and punishing particular acts under certain circumstances, to provide, expressly or impliedly, that any person who shall do the act shall do it at his peril, and that he shall not be allowed to escape punishment by showing that he acted in good faith, without negligence, and in ignorance of the existence of the circumstances rendering the act unlawful. If the language and subject-matter of the statute show clearly that this was the in-

---

Am. Rep. 575; Stern v. State, 53 Ga. 229, 21 Am. Rep. 266; Duncan v. State, 7 Humph. (Tenn.) 148; State v. Hause, 71 N. C. 518.

Sometimes a statute punishes any person who shall "knowingly" do the prohibited act. In such a case, it is clear that the offense is not committed by one who does the act in ignorance of the existence of the facts which render the statute applicable. This is so, for example, under a statute punishing any person who shall "knowingly" sell liquor to a minor without his parent's consent. Fielding v. State (Tex. Cr. App.) 52 S. W. 69.

[107] Ante, § 56.

tention of the legislature, the courts must give it effect, however harshly the statute may seem to operate in the particular instance.[108] But it should not thus construe a statute, unless the intention of the legislature is clear.[109] In construing the various statutes the courts and judges have differed, and some of the decisions cannot possibly be reconciled.

(*b*) *Particular Statutes.*—Mistake of fact, though *bona fide,* and not due to negligence, has been held by some of the courts, though in some cases not by others, to be no defense in prosecutions under statutes punishing the following offenses: Receiving two or more lunatics into an unlicensed house;[110] transportation of a slave, without written permission of his owner, by any railroad company, or by the owner or captain of any steam-

---

[108] State v. Presnell, 12 Ired. (N. C.) 103, Beale's Cas. 177; Com. v. Farren, 9 Allen (Mass.) 489; Com. v. Mash, 7 Metc. (Mass.) 472, Beale's Cas 304; State v. Kelly, 54 Ohio St. 166; State v. Smith, 10 R. I. 258.

[109] Reg. v. Tolson, 23 Q. B. Div. 168, Beale's Cas. 286; Duncan v. State, 7 Humph. (Tenn.) 148.

[110] Reg. v. Bishop, 5 Q. B. Div. 259.

boat;[111] keeping for sale or selling naphtha under an assumed name;[112] killing, for the purpose of sale, a calf less than four weeks old;[113] keeping for sale or selling adulterated milk, [114] or confectionery, [115] or tobacco,[116] or food or drugs,[117] or liquors;[118] keeping for sale or selling oleomargarine not so marked or colored as to show what it is;[119] keeping for sale or selling intoxicating liquors;[120] selling intoxicating liquors to mi-

---

111 State v. Baltimore & S. Steam Co., 13 Md. 181.

But see Duncan v. State, 7 Humph. (Tenn.) 148; Birney v. State, 8 Ohio, 230, Beale's Cas. 303; post, notes 125, 127.

112 Com. v. Wentworth, 118 Mass. 441.

113 Com. v. Raymond, 97 Mass. 567.

114 Com. v. Farren, 9 Allen (Mass.) 489; Com. v. Waite, 11 Allen (Mass.) 264, 87 Am. Dec. 711; Com. v. Smith, 103 Mass. 444; State v. Smith, 10 R. I. 258; People v. Kibler, 106 N. Y. 321.

115 See Com. v. Chase, 125 Mass. 202.

116 Reg. v. Woodrow, 15 Mees. & W. 404.

117 State v. Kelly, 54 Ohio St. 166, 177.

Sale of vinegar below a certain standard. People v. Worden Grocer Co. (Mich.) 77 N. W. 315.

118 State v. Stanton, 37 Conn. 421.

119 State v. Newton, 50 N. J. Law, 534; Com. v. Weiss, 139 Pa. St. 247, 23 Am. St. Rep. 182.

120 Com. v. Boynton, 2 Allen (Mass.) 160. Beale's

nors or to persons who are in the habit of becoming intoxicated;[121] permitting minors to play billiards, or to be in billiard rooms or saloons.[122]

Mistake or ignorance of fact, when *bona fide* and not due to negligence, has been held a good defense in prosecutions under statutes punishing the following offenses:[123] Being

Cas. 306; Com. v. O'Kean, 152 Mass. 584; Com. v. Goodman, 97 Mass. 117; Kring v. State, 66 Miss. 502. Contra, Farrell v. State, 32 Ohio St. 456.

[121] Barnes v. State, 19 Conn. 398; McCutcheon v. People, 69 Ill. 601; Farmer v. People, 77 Ill. 322; State v. Thompson, 74 Iowa, 119; Ulrich v. Com., 6 Bush. (Ky.) 400; State v. Heck, 23 Minn. 549; In re Carlson's License, 127 Pa. St. 330; Com. v. Zelt, 138 Pa. St. 615; State v. Cain, 9 W. Va. 559; State v. Farr, 34 W. Va. 84; State v. Baer, 37 W. Va. 1; State v. Hartfiel, 24 Wis. 60. And see Com. v. Finnegan, 124 Mass. 324.

Contra, Alder v. State, 55 Ala. 16; Brown v. State, 24 Ind. 113; Goetz v. State, 41 Ind. 162; Robinius v. State, 63 Ind. 235; Williams v. State, 48 Ind. 306; Mulreed v. State, 107 Ind. 62; Faulks v. People, 39 Mich. 200; People v. Welch, 71 Mich. 548; Crabtree v. State, 30 Ohio St. 382.

[122] State v. Kinkead, 57 Conn. 173; State v. Probasco, 62 Iowa, 400; Com. v. Emmons, 98 Mass. 6. Contra, Marshall v. State, 49 Ala. 21; Stern v. State, 53 Ga. 229, 21 Am. Rep. 266.

[123] See the cases cited as contra in notes preceding.

in possession of government stores marked with the government mark;[124] receiving or transporting of any colored person by the owner or captain of any steamboat, without particular evidence of his freedom;[125] allowing a vehicle to be used for travel on Sunday, except in a case of necessity or charity;[126] harboring or secreting slaves;[127] keeping for sale or selling diseased meat.[128]

(*c*) *Bigamy and Adultery.*—In a number of cases the question has arisen whether ignorance or mistake of fact is a good defense in prosecutions for bigamy or adultery. Under statutes punishing any person who, being married, should marry any other person during the life of his or her wife or husband, some courts have held that a *bona fide* and reasonable belief in the death of the former husband or wife is a good defense, while

---

[124] Reg. v. Sleep, Leigh & C. 44. See, also, Rex v. Banks, 1 Esp. 144; Anon., Fost. C. L. 439, Beale's Cas. 284.

[125] Duncan v. State, 7 Humph. (Tenn.) 148. And see note 127, infra. Contra, see note 111, supra.

[126] Myers v. State, 1 Conn. 502, Beale's Cas. 302

[127] Birney v. State, 8 Ohio. 230, Beale's Cas, 303. See note 125, supra.

[128] Teague v. State, 25 Tex. App. 577.

others have held the contrary.[129] The same is true of prosecutions for adultery in cohabiting after such marriage.[130]

---

[129] In the leading English case of Reg. v. Tolson, 23 Q. B. Div. 168, Beale's Cas. 286, the majority of judges of the court of appeal, queen's bench division, held such belief a good defense, notwithstanding a proviso in the statute that it should not apply to any person marrying a second time after the absence of his or her wife or husband for seven years, without being known to such person to have been living within that time. As to this case, see ante, § 56 (b), note. The previous cases of Reg. v. Turner, 9 Cox, C. C. 145, Reg. v. Horton, 11 Cox, C. C. 670, and Reg. v. Moore, 13 Cox, C. C. 544, were in accord with this case; while Reg. v. Gibbons, 12 Cox, C. C. 237, and Reg. v. Bennett, 14 Cox, C. C. 45, were to the contrary.

In this country, there has been the same conflict. That such belief was a good defense was held in Squire v. State, 46 Ind. 459. That it was not a defense was held in Com. v. Mash, 7 Metc. (Mass.) 472, Beale's Cas. 304, Com. v. Hayden, 163 Mass. 453, 47 Am. St. Rep. 468, and State v. Zichfeld, 23 Nev. 394, overruling State v. Gardner, 5 Nev. 377. See, also, State v. Sherwood, 68 Vt. 414 (belief in divorce); Reynolds v. State (Neb.) 78 N. W. 483.

Marrying a second time without reasonable belief of first spouse's death is bigamy. Dotson v. State, 62 Ala. 141, 34 Am. Rep. 2.

[130] Where a woman marries and cohabits with a married man, not knowing of his previous mar-

(*d*) *Illegal Voting.*—On a prosecution for illegal voting, it is a good defense to show that the accused believed in good faith in the existence of facts which, if they had existed, would have rendered his vote legal, as that he was twenty-one years of age, that he was born in the United States, that he had resided in the district for the time fixed by the statute, etc.[131]

---

riage, she is not guilty of adultery. Vaughan v. State, 83 Ala. 55; Banks v. State, 96 Ala. 78.

In Com. v. Thompson, 6 Allen (Mass.) 591, 83 Am. Dec. 653, Beale's Cas. 308, it was held that a man could not be convicted of adultery, who, in good faith, married and cohabited with a woman whose husband had been absent for more than seven years without being heard from, and was believed by both parties to be dead. The court was influenced by a statute punishing bigamy, which contained a proviso that it should not apply in such a case.

On a new trial in this case, it appeared that the woman had deserted her husband, and remained away for seven years without hearing from him or making inquiry, and a conviction was sustained. Com. v. Thompson, 11 Allen (Mass.) 23, 87 Am. Dec. 685.

[131] Gordon v. State, 52 Ala. 308, 23 Am. Rep. 575; Carter v. State, 55 Ala. 181; McGuire v. State, 7 Humph. (Tenn.) 54.

If he knew all the facts, however, mistake as to the law is no excuse. Post, § 73.

(*e*) *Keeping Disorderly House.*—A statute punishing any person who shall keep a place resorted to for the purpose of gambling, or for the purpose of prostitution, is to be construed as requiring knowledge that the place is resorted to for such a purpose.[132]

71. Effect of Being Engaged in Unlawful Act.

(*a*) *In General.*—As was explained in a former section, there are many cases in which a person may be held criminally responsible for results not intended by him, because of the fact that he was engaged in the commission of an unlawful act.[133] In such a case his ignorance or mistake of fact is no defense. Thus, a man may be guilty of murder if he unintentionally kills another while engaged in the commission of some other felony.[134] A man who shoots at a person and kills him is guilty of murdering that person, though he may have intended to kill some other person.[135] A man is guilty of manslaughter

---

As to the distinction between mistake of law and mistake of fact, in reference to illegal voting, see McGuire v. State, 7 Humph. (Tenn.) 54.

[132] State v. Currier, 23 Me. 43.

[133] Ante, § 59.

[134] Post, § 248.

[135] Post, § 241(b).

if he assaults another and unintentionally causes his death.[136] It has also been held that a person who stabs another with intent to kill is guilty of an assault with intent to kill him, though he may have mistaken him for some one else.[137]

(*b*) *Immoral Acts.*—If a man is engaged in the commission of an immoral act, even though it may not be indictable, and unintentionally commits a crime, it is generally no defense for him to show that he was ignorant of the existence of the circumstances rendering his act criminal.[138] Thus, a man who has unlawful sexual intercourse with a woman cannot defend against a charge of adultery on the ground that he did not know that the woman was married.[139] And a man who has intercourse with a girl below the age of consent, with her consent, cannot defend against a charge of rape, or unlawful carnal knowl-

---

[136] Post, § 263.

[137] McGehee v. State, 62 Miss. 772. As to this, however, there is a conflict in the cases. See post, § 208.

[138] State v. Ruhl, 8 Iowa, 447; Com. v. Murphy, 165 Mass. 66, 52 Am. St. Rep. 496.

[139] Com. v. Elwell, 2 Metc. (Mass.) 190, 35 Am. Dec. 398; Fox v. State, 3 Tex. App. 329, 30 Am. Rep. 144.

edge punished by statute, on the ground that he reasonably believed her to be above the age of consent.[140] The same principle applies under a statute punishing any person who shall unlawfully take any unmarried girl under a certain age out of the possession and against the will of her father,[141] or who shall abduct or entice away any girl under a certain age for the purpose of prostitution, etc.[142]

(*c*) *Acts Merely Mala Prohibita.*—The principle that a man who is engaged in the

---

[140] Com. v. Murphy, 165 Mass. 66, 52 Am. St. Rep. 496; State v. Houx, 109 Mo. 654; State v. Newton, 44 Iowa, 45.

[141] In Reg. v. Prince, L. R. 2 C. C. 154, 13 Cox, C. C. 138, a man was convicted under a statute of unlawfully taking an unmarried girl, under the age of 16, out of the possession and against the will of her father. It was proved that he did take the girl, and that she was under 16, but that he believed and had good reason for believing that she was over 16. It was held that this mistake of fact was no defense, and that he was properly convicted. See, also, Reg. v. Robins, 1 Car. & K. 456; Reg. v. Booth, 12 Cox, C. C. 231. Compare Reg. v. Hibbert, L. R. 1 C. C. 184, 11 Cox, C. C. 246.

[142] State v. Ruhl, 8 Iowa, 447; People v. Dolan, 96 Cal. 315. Contra, Mason v. State, 29 Tex. App. 24.

commission of an unlawful act is responsible for unintended results due to his ignorance of fact does not apply where the act is merely *malum prohibitum*. Thus it has been held that a man who drives over another is not guilty of criminal assault and battery merely because he was driving at a speed prohibited by an ordinance.[143]

(*d*) *Mere Civil Wrongs.*—Nor does the principle apply where the act was a mere civil wrong. Thus, a man who wrongfully threw another's package into the sea, though guilty of a civil trespass, was held not guilty of manslaughter because he unintentionally

---

[143] Com. v. Adams, 114 Mass. 323, 19 Am. Rep. 362, Beale's Cas. 204; 1 Hale, P. C. 39; Fost. C. L. 259.

"It is true that one in pursuit of an unlawful act may sometimes be punished for another act, done without design and by mistake, if the act done was one for which he could have been punished if done willfully. But the act, to be unlawful in this sense, must be an act bad in itself, and done with an evil intent; and the law has always made this distinction: That if the act the party was doing was merely malum prohibitum, he should not be punishable for the act arising from misfortune or mistake; but, if malum in se, it is otherwise." Com. v. Adams, supra.

killed a person who was bathing in the sea.[144]

72. Negligence.

Ignorance of fact is no defense, as a general rule, if the accused could have known the facts if he had exercised reasonable care and diligence.[145] Thus, a person who negligently throws a board from a building into the street, and kills a person on the street, cannot escape responsibility for the homicide on the ground that he did not know any person was passing along the street.[146] The same is true of a man who causes another's death by negligent use of a gun which he believes to be unloaded,[147] or by the use of dangerous drugs which he does not understand, etc.[148]

The same principle applies to statutory offenses, on a prosecution for which non-negligent ignorance of fact would be held an excuse. Thus, in those states in which it is held that a statute punishing the sale of intoxicating liquors to minors or drunkards

---

[144] Reg. v. Franklin, 15 Cox, C. C. 163, Beale's Cas. 203.

[145] Dotson v. State, 62 Ala. 141, 34 Am. Rep. 2; Swigart v. State, 99 Ind. 111.

[146] Post, § 264.

[147] Post, § 264(c).

[148] Post, § 264(c).

does not apply where a person sells to a minor or drunkard in the *bona fide* and reasonable belief that he is over twenty-one years of age, or not a drunkard,[149] it has been held that such belief is no defense if there is negligence, as where the belief is based merely on the statement of the party himself.[150] The same is true under a statute punishing bigamy.[151]

III. IGNORANCE OR MISTAKE OF LAW.

73. In General.—Every person is conclusively presumed to know the law, and, on a prosecution for a crime, ignorance or mistake of law is no excuse. The rule does not apply, however, where, by reason of mistake as to one's legal rights, there was an absence of a specific criminal intent which is essential to the crime charged.

There is no principle of the criminal law that is better settled than this. The maxim is, *"ignorantia legis neminem excusat."* Every man is conclusively presumed to know the law, and on a prosecution for a crime,

---

149 Ante, § 70 (b).

150 Swigart v. State, 99 Ind. 111; Goetz v. State, 41 Ind. 162; Crabtree v. State, 30 Ohio St. 382.

151 A man who marries a second time during his first wife's life, without reasonable grounds to believe her to be dead, is liable to indictment for bigamy. Dotson v. State, 62 Ala. 141, 34 Am. Rep. 2; Reynolds v. State (Neb.) 78 N. W. 483.

whether common law or statutory, he cannot escape responsibility by showing that he was ignorant or mistaken as to the law,[152] even though he may have acted in the most perfect good faith, and under advice of counsel.[153]

---

[152] 1 Coke, 177; Broom, Leg. Max. 253; 1 Hale P. C. 42; Rex v. Bailey, Russ. & R. 1, Beale's Cas. 280; The Barronet's Case, 1 El. & Bl. 1; Rex v. Esop, 7 Car. & P. 456, Beale's Cas. 282; Reynolds v. U. S., 98 U. S. 145, Beale's Cas. 179; State v. Goodenow, 65 Me. 30, Beale's Cas. 309; Jellico Coal Min. Co. v. Com., 96 Ky. 373; Halsted v. State, 41 N. J. Law, 552, 32 Am. Rep. 247; Lancaster v. State, 3 Cold. (Tenn.) 340, 91 Am. Dec. 288; State v. Welch, 73 Mo. 284, 39 Am. Rep. 515. And see the other cases cited in the notes following.

"'Ignorantia legis neminem excusat.' Everyone competent to act for himself is presumed to know the law. No one is allowed to excuse himself by pleading ignorance. Courts are compelled to act upon this rule, as well in criminal as civil matters. It lies at the foundation of the administration of justice. And there is no telling to what extent, if admissible, the plea of ignorance would be carried, or the degree of embarrassment that would be introduced into every trial by conflicting evidence upon the question of ignorance. * * * To allow ignorance as an excuse would be to offer a reward to the ignorant." Per Pearson, J., in State v. Boyett, 10 Ired. (N. C.) 336, 343.

[153] Halsted v. State, 41 N. J. Law, 552, 32 Am. Rep. 247. And see State v. Goodenow, 65 Me. 30,

Application of the Rule.—Thus, on a prosecution for bigamy in violation of an act of congress, it was held that the accused could not escape responsibility by showing that he was a Mormon, and that he married the second wife in accordance with his religious belief, and thinking that he had a right to do so. His belief that the law did not apply to him, or that it was unconstitutional, was nothing more than ignorance or mistake of the law.[154] The principle also applies in a prosecution for bigamy or adultery, in which the accused sets up in defense that he believed that a void decree of divorce obtained by him or the other party was valid,[155] or that by reason of any other mistake as to the law he believed he had a

---

Beale's Cas. 309; State v. Hughes, 58 Iowa, 165; People v. Weed, 29 Hun (N. Y.) 628.

[154] Reynolds v. U. S., 98 U. S. 145, Beale's Cas. 179.

[155] State v. Goodenow, 65 Me. 30, Beale's Cas. 309; State v. Hughes, 58 Iowa, 165; State v. Whitcomb, 52 Iowa, 85, 35 Am. Rep. 258; Russell v. State, 66 Ark. 185; Reynolds v. State (Neb.) 78 N. W. 483. And see Davis v. Com., 13 Bush. (Ky.) 318; State v. Armington, 25 Minn. 29. Compare Squire v. State, 46 Ind. 459.

right to do the act with which he is charged.[156] The same is true when ignorance or mistake of law is set up as a defense in prosecutions for illegally voting at an election,[157] for gaming or keeping a gaming

[156] See Medrano v. State, 32 Tex. Cr. R. 214; State v. Hughes, 58 Iowa, 165; People v. Weed, 29 Hun (N. Y.) 628.

In State v. Goodenow, 65 Me. 30, Beale's Cas. 309, a man and woman attempted to marry and cohabited while the woman had another husband living. On a prosecution for adultery, it appeared that her husband had married again, and that they were advised by the justice who married them that this gave her a right to marry again, and that they married and cohabited in good faith. It was held that this was no excuse, as they could not set up their ignorance of law.

In Hoover v. State, 59 Ala. 57, which was a prosecution against a negro man for cohabiting with a white woman, in violation of a statute making it an offense for white and colored persons to intermarry or to live together in adultery or fornication, and declaring such marriages void, it was held no defense for the defendant to show that, prior to his attempted marriage with the woman, the probate judge advised him that it was lawful for him to marry her, since ignorance of the law was no excuse. "The maxim, 'ignorantia legis neminem excusat,'" said the court, "is a stern but inflexible and necessary rule of law, that has no exceptions in judicial administration."

[157] U. S. v. Anthony, 11 Blatchf. (U. S.) 200,

house or device, etc.,[158] or for obtaining property by means of false and fraudulent representations.[159]

74. Reasonable and Unavoidable Ignorance of Law.

The presumption that every person knows the law, within the meaning of this rule, is not a rebuttable presumption of fact, but it is a conclusive presumption of law. It can

---

Fed. Cas. No. 14,459; Hamilton v. People, 57 Barb. (N. Y.) 625; State v. Boyett, 10 Ired. (N. C.) 336; McGuire v. State, 7 Humph. (Tenn.) 54. And see State v. Sheeley, 15 Iowa, 404.

The contrary was held under a statute punishing any person who should vote, "knowing himself not to be a qualified voter." Com. v. Bradford, 9 Metc. (Mass.) 268.

[158] Thus, a person exhibiting and keeping a gambling device, in violation of a statute, cannot escape liability on the ground that he did so in good faith, believing he had a right to do so under a license, where the license was unauthorized and void. Atkins v. State, 95 Tenn. 474.

In a prosecution for keeping and operating a pool room for betting on horse races, in violation of a statute, it is no defense that the accused was ignorant of the law, and believed that a license issued to him by the municipal authorities authorized his illegal act. Debardelaben v. State, 99 Tenn. 649.

[159] When a person obtains another's property by making false representations, with intent to

make no difference, therefore, in the application of the rule, that the accused was a foreigner, temporarily in the country, and that the act was permitted by the laws of his own country.[160]

The rule applies in all cases, even though it may clearly appear that the accused could not possibly know the law.[161] It applies even though the state may admit his ignorance of the law at the trial.[162]

75. Mistake of Law Negativing Specific Intent.

The rule that mistake of law is no defense does not apply where a specific evil intent is

---

deceive, it is no defense that he did not know that he was violating the statute against false pretenses. Com. v. O'Brien, 172 Mass. 248.

[160] See The Barronet's Case, 1 El. & Bl. 1, where a Frenchman fought a duel in England, by the laws of which dueling was unlawful, though it was lawful under the French law; and Rex v. Esop, 7 Car. & P. 456, Beale's Cas. 282, where a person from Bagdad committed an unnatural crime on a ship, at the dock in England, and was convicted, though, by the laws of his own country, it was not considered a crime.

[161] See Rex v. Bailey, Russ. & R. 1, Beale's Cas. 280, where the defendant was convicted of a crime under a statute passed after he had sailed from England, the act having been committed on the vessel before its return to England.

[162] Jellico Coal Min. Co. v. Com., 96 Ky. 373.

an essential element of the offense charged, and proof of the mistake as to the law negatives the existence of such intent. Thus, on a prosecution for larceny or robbery, to constitute which an intent to steal is necessary, the accused may show that he believed in good faith that he had a legal right to the property.[163] And on a prosecution for perjury the accused may show that there was no corrupt intent because he swore in good faith after seeking the advice of counsel.[164] The same principle has been applied under a statute against "maliciously" setting fire to any furze or fern.[165]

IV. JUSTIFICATION.

76. In General.—There are some circumstances under which an act which would otherwise be a crime is justifiable. In such a case no crime at all is committed. The grounds which have been relied upon as constituting justification, and which may or may not justify, according to the circumstances, are:

---

[163] Rex v. Hall, 3 Car. & P. 409, Beale's Cas. 281; post, §§ 327, 378.

[164] U. S. v. Stanley, 6 McLean (U. S.) 409, Fed. Cas. No. 16,376; U. S. v. Conner, 3 McLean (U. S.) 573, Fed. Cas. No. 14,847; State v. McKinney, 42 Iowa, 205; post, § 431(d).

[165] Reg. v. Towse, 14 Cox, C. C. 327, Beale's Cas. 283.

1. Public authority.
2. Domestic authority.
3. Prevention of offenses.
4. Defense of one's person or property.
5. Defense of other persons.
6. Necessity.
7. Compulsion or command.
8. Custom.

77. Public Authority.

(*a*) *In General.*—It may be laid down as an undoubted principle that a person who does an act under valid public sanction or authority, and without exceeding or abusing such authority, is guilty of no crime, though the same act would be a crime if committed without such authority.[166]

Some of the plainest cases are the execution of a criminal by the proper officer in a proper manner under a valid conviction and sentence for a capital offense;[167] authorized arrest and imprisonment of criminals or persons accused of crime;[168] killing of a person necessarily in order to arrest for a felony or

---

[166] See Reg. v. Lesley, Bell, C. C. 220, 8 Cox, C. C. 269, Beale's Cas. 311; State v. Mayor, etc., of Knoxville, 12 Lea (Tenn.) 146, Beale's Cas. 313.

[167] Foster C. L. 267; Beale's Cas. 311; post, § 267.

[168] See Reg. v. Lesley, supra. And see post, § 211.

to prevent an escape.[169] What would otherwise be a common nuisance may be justified on this ground. If, in order to prevent the spread of an epidemic disease, inconvenience is caused to a few persons by the smoke and noxious vapors arising from the burning of infected clothing and bedding, and if the burning is done by public authority or sanction, in good faith, for the public safety, and such means are employed as are usually resorted to and approved by medical science in such cases, and if done with reasonable care and regard for the safety of others, there is no indictable nuisance.[170]

(*b*) *Laws are Without Extra-territorial Effect.*—When the laws of a country are relied upon as justification for an act, it must be borne in mind that the laws of a country have no extra-territorial effect, subject to the qualification that the ships of a country are regarded as a part of its territory, though they may be on the high seas. This is well illustrated by an English case in which the defendant was convicted on an indictment

[169] Fost. C. L. 267; Beale's Cas. 311; U. S. v. Clark, 31 Fed. 710, Beale's Cas. 319; post § 271.

[170] State v. Mayor, etc., of Knoxville, 12 Lea (Tenn.) 146, Beale's Cas. 313.

charging him with assaulting the prosecutors on the high seas, and imprisoning and detaining them. It appeared that the prosecutors were Chilian subjects, and had been ordered by the government of Chili to be banished from that country to England. The defendant, being master of an English merchant vessel lying in the territorial waters of Chili, contracted with the Chilian government to take the prosecutors from Valparaiso to Liverpool, and they were accordingly brought on board his vessel by the officers of the government, and carried by him to Liverpool under his contract. It was held that, although the conviction could not be supported for the assault and imprisonment in the Chilian waters, it must be sustained for that which was done out of the Chilian territory. Although the defendant was justified in receiving the prosecutors on board his vessel in Chili, that justification ceased when he passed the line of Chilian jurisdiction, and, as his wrongful detention thereafter was on an English vessel, he was guilty of an offense punishable by English law.[171]

---

[171] Reg. v. Lesley, Bell, C. C. 220, 8 Cox, C. C. 269, Beale's Cas. 311.

78. Domestic Authority.

A father, or other person standing *in loco parentis,* has authority to give reasonable correction to his child, and in doing so he is not guilty of an assault and battery, nor of felonious homicide if death ensues without his fault; but if the correction exceeds the bounds of moderation, either in the measure of it or in the instrument used, his authority is no justification, but he is guilty of assault and battery, manslaughter, or murder, according to the circumstances.[172] The same principles were formerly applicable to husband and wife, master and servant, and teacher and pupil, but the extent to which this is now the case is not clear.[173]

79. Prevention of Offenses.

It is not only the right, but the duty, of every person, whether an officer or merely a private person, to prevent the commission of a felony, and acts done for this purpose, if necessary, are justifiable. If a felony can be prevented in no other way, even a homi-

---

[172] Fost. C. L. 262; Beale's Cas. 315; Reg. v. Griffin, 11 Cox, C. C. 402. Beale's Cas. 315; post, §§ 211, 263(c), 274.

[173] See post, §§ 211, 263(c), 274.

cide will be justifiable.[174] To be justifiable, the homicide must be necessary, and must be committed in order to prevent the felony.[175] For this reason the rule does not extend to a secret felony, like larceny, but only to such felonies as are committed by force or surprise, like murder, rape, robbery, burglary, etc.[176]

Homicide to prevent the commission of a misdemeanor or of a bare trespass is not justifiable,[177] though an assault and battery may be justified on such ground.[178] Even a homicide may be justifiable if necessarily committed in an attempt to suppress a riot or affray.[179]

80. Defense of One's Person or Property.

(*a*) *In General.*—It is an elementary principle of the common law that a man has the right to defend his life, liberty, and property. This right is not only given to him

---

[174] Rex v. Compton, Lib. Ass'n 97, pl. 55, Beale's Cas. 316; post, § 268.

[175] Reg. v. Dadson, 4 Cox, C. C. 358, Beale's Cas. 317; post, § 268(c).

[176] Reg. v. Murphy, 1 Craw. & D. 20, Beale's Cas. 318; post, § 268(c).

[177] Post, § 269.

[178] Post, § 211.

[179] Post, § 270.

by the common law, but in many states it is guaranteed by the declaration of rights or constitution, so that he cannot be deprived of the right by the legislature. Speaking generally, "the right of defense is the right to do whatever apparently is reasonably necessary to be done in defense under the circumstances of the case." [180]

(*b*) *Defense of One's Person.*—A man is not bound to submit to an assault upon himself, and seek redress in the courts, but may oppose force by force in self-defense, and his acts will be justifiable, provided they do not exceed the bounds of necessity, and provided he was not himself in fault in bringing on the necessity for self-defense. Striking another to prevent a threatened assault and battery is not a crime at all. A homicide is justifiable, not merely excusable, if necessarily committed by a person, who is without fault himself, in order to save his own life or to prevent great bodily harm, or to prevent the commission of a known felony by violence or surprise upon his person, his habitation, or his property. It was said by Foster: "In the case of justifiable self-defense the injured

[180] **Aldrich v. Wright, 53 N. H. 398, 16 Am. Rep. 339.**

party may repel force by force in defense of his person, habitation, or property, against one who manifestly intendeth and endeavoreth by violence or surprise to commit a known felony upon either. In these cases he is not bound to retreat, but may pursue his adversary till he findeth himself out of danger, and if, in a conflict between them, he happeneth to kill, such killing is justifiable. * * * Where a known felony is attempted upon the person, be it to rob or murder, here the party assaulted may repel force by force * * * and, if death ensueth, the party will be justified. * * * A woman, in defense of her chastity, may lawfully kill a person attempting to commit a rape upon her. * * * An attempt is made to commit arson or burglary in the habitation; the owner, or any part of his family, or even a lodger with him, may lawfully kill the assailants for preventing the mischief intended." [181]

(c) *Defense of One's Property.*—A man not only has a right to defend his life and his person, but he also has a right to defend

[181] Fost. C. L. 273; Beale's Cas. 326; Shorter v. People, 2 N. Y. 193, 51 Am. Dec. 286, Beale's Cas. 330. See post, §§ 276-285, where the right of self defense is treated at length.

his property. He cannot take another's life, or inflict grevious bodily harm, merely in defense of property, but he may use necessary means short of this, and his acts in such necessary defense will not be a crime either at common law or under a statute.[182]

Where a statute imposed a penalty upon any person who, between certain days, should in any way destroy mink, beaver, otter, etc., it was held that the statute did not apply to one who killed minks between such days, where he did so in apparently necessary defense of his poultry.[183] The same principle has been applied to the killing, trapping, or otherwise injuring dogs, hogs, and other animals in defense of property.[184]

(*d*) *Necessity for Defense.*—To give rise to the right of defense, whether of life, or of the person, or of property, there must be necessity for defense, and the acts done in de-

---

[182] Aldrich v. Wright, 53 N. H. 398, 16 Am. Rep. 339.

[183] Aldrich v. Wright, 53 N. H. 398, 16 Am. Rep. 339;

[184] Hodge v. State, 11 Lea (Tenn.) 528, 47 Am. Rep. 307; Thompson v. State, 67 Ala. 106, 42 Am. Rep. 101; Lott v. State, 9 Tex. App. 206. And see the note in 47 Am. Rep. 310.

fense, to be justifiable, must not go beyond the necessity.[185] "When force, purely defensive at first, increases and becomes more than is reasonably necessary for defense, the excess is aggressive, and not defensive." [186]

To justify the defensive destruction of human life, the danger must be, not problematical and remote, but evident and immediate, or imminent.[187] And so it is in defense of property.[188] But imminence of danger, as was said in a New Hampshire case, "is relative and not absolute, and is measured more by the nature of the consequences than by the lapse of time. It is not a condition of things in which the party whose person or property is imperiled is allowed to anticipate, and prevent the impending mischief by making a deadly defense only a precise and invariable number of seconds, minutes, hours, or days before the mischief would happen without such defense. The law does not fix

---

[185] Creighton v. Com., 84 Ky. 103, Beale's Cas. 339; Aldrich v. Wright, 53 N. H. 398, 16 Am. Rep. 339; State v. Rheams, 34 Minn. 18.

[186] Aldrich v. Wright, supra.

[187] Post, § 279.

[188] Aldrich v. Wright, 53 N. H. 398, 16 Am. Rep. 339.

the distance of time between the justifiable defense and the mischief, for all cases, by the clock or calendar. The chronological part of the doctrine of defense, like the rest of it, is a matter of reasonableness; and the reasonableness depends upon circumstances."[189]

Apparent Danger.—In determining whether an act claimed to have been done in self-defense was necessary, the question is not whether there was *real* necessity, but whether there was reasonably apparent necessity. This is true as respects both defense of life[190] and defense of property.[191]

Elsewhere Treated.—The whole subject of self-defense and defense of property will be fully treated, and to better advantage, in dealing with homicide and assault and battery.[192]

---

189 Aldrich v. Wright, supra. This was a case in which the defendant killed minks in defense of his poultry, and set up defense of property in an action for a penalty under a statute against destroying minks between certain dates.

190 Shorter v. People, 2 N. Y. 197, 51 Am. Dec. 286, Beale's Cas. 330; Campbell v. People, 16 Ill. 17, 61 Am. Dec. 49; Aldrich v. Wright, 53 N. H. 398, 16 Am. Rep. 339.

191 Aldrich v. Wright, 53 N. H. 398, 16 Am. Rep. 339.

192 Post, §§ 276-288.

To treat it further here would result in useless repetition.

81. Defense of Others.

There are many cases in which a person may be justified in interfering in defense of others than himself. If a man is assaulted by another, his servant may interfere in his defense, and *vice versa.*[193] The same is true of parent and child.[194] And in the case of attempted arson or burglary, a guest or lodger may interfere and act in defense in the same manner as the owner himself might do.[195]

As was shown in a previous section, any person may lawfully interfere, and even take

---

[193] 1 East, P. C. 289; Fost. C. L. 273, Beale's Cas. 326, 343; post, §§ 215, 288.

[194] Reg. v. Rose, 15 Cox, C. C. 540, Beale's Cas. 342 (where a son shot his father in defense of his mother); Campbell v. Com., 88 Ky. 402 (where it was held that a father has a right to defend his daughter against an assault and battery by her husband); Com. v. Malone, 114 Mass. 295, (where it was held that an assault and battery by a mother to prevent an indecent assault upon her sixteen-year-old daughter was justifiable). And see post, §§ 215, 288.

[195] 1 East, P. C. 290, Fost. C. L. 273; Beale's Cas. 326, 343; post, §§ 287, 288.

life, to prevent a felony attempted by violence or surprise.[196] In other cases the right of a person to interfere in defense of a stranger is not clear. A stranger would no doubt be justified in interfering to prevent an assault upon one who is clearly without fault, without being guilty of an assault and battery, and he may interfere as a mediator to preserve the peace in the case of an affray.[197] A stranger, however, cannot lawfully interfere in an affray, and take the part of one party against the other.[198]

82. Necessity.

(*a*) *In General.*—"An act which would otherwise be a crime may be excused if the person accused can show that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him, or upon others whom he was bound to protect, inevitable and irreparable evil; that no more was done than was reasonably necessary for that purpose; and that the

---

[196] Ante, § 79.

[197] See 1 East, P. C. 290, Beale's Cas. 343.

[198] 1 East, P. C. 290. Beale's Cas. 343.

evil inflicted by it was not disproportionate to the evil avoided."[199]

The cases referred to in previous sections under this subdivision are treated in the books as cases of necessity, as the execution of criminals, the arrest and detention of criminals, the prevention of felony, suppression of riots and affrays, necessary defense of person or property, etc. There are many other cases of necessity besides these.

(*b*) *Larceny.*—It is said by Lord Bacon that, if a man steal viands to satisfy his present hunger, this is no felony nor larceny;[200] and this is no doubt true if the case is one of actual necessity. Stealing cannot be justified on the ground of necessity, however, where, as is now generally the case, relief may be obtained by application to the public authorities.

(*c*) *Homicide to Save Life.*—It is also

---

[199] Steph. Dig. Crim. Law, art. 32, citing Rex v. Stratton, 21 How. St. Tr. 1045, wherein it was said by Lord Mansfield: "Wherever necessity forces a man to do an illegal act,—forces him to do it,—it justifies him, because no man can be guilty of a crime without the will and intention of his mind." See Beale's Cas. 361, note.

[200] Bacon's Maxims, reg. 5, Beale's Cas. 356.

said by Lord Bacon that "if divers be in danger of drowning by the casting away of some boat or bark, and one of them get to some plank, or on the boat side, to keep himself above water, and another, to save his life, thrust him from it, whereby he is drowned, this is neither *se defendendo,* nor by misadventure, but is justifiable."[201] It is extremely doubtful, however, whether a man is justified in taking another's life to save his own, where the necessity is not due to the other's fault, and there are decisions to the effect that he is not.[202] Homicide in self-

---

[201] Bacon's Maxims, reg. 5, Beale's Cas. 356.

[202] Thus, in Reg. v. Dudley, 15 Cox, C. C. 624, 14 Q. B. Div. 273, Beale's Cas. 357, it was held that a man who, in order to escape death from hunger, kills another for the purpose of eating his flesh, is guilty of murder, although at the time of the act he is in such circumstances that he believes, and has reasonable grounds for believing, that it affords the only chance of preserving his life. In this case it appeared that the defendants, D. and S., seamen, and the deceased, a boy who was with them, were cast away in a storm on the high seas, and compelled to put into an open boat; that the boat was drifting on the ocean, and was probably more than 1,000 miles from land; that on the eighteenth day, when they had been seven days without food, and five without water, D. proposed

defense has been considered in a previous section.

---

to S. that lots should be cast to determine who should be put to death to save the others, and that they afterwards thought it would be better to kill the boy, that their lives should be saved; that on the twentieth day they killed the boy, and fed on his flesh for four days, when they were rescued by a vessel. At the time of the act there was no sail in sight, nor any reasonable prospect of relief. It was held that the homicide was not justifiable, and that the defendants were guilty of murder.

In U. S. v. Holmes, 1 Wall. Jr. 1, Fed. Cas. No. 15,383, there is dictum by Judge Baldwin to the effect that, if two persons, who owe no duty to each other that is not mutual, should, by accident, not attributable to either, be placed in a situation where both cannot survive, neither would commit a crime in saving his own life in a struggle for the only means of safety; and also that, if several persons should be cast away in a boat without food, and the killing and eating of one should be necessary to save the others, a killing of one after the casting of lots would be justifiable. It was held, however, that, in applying the law, regard must be had not only to the jeopardy in which the parties are, but also to the relations in which they stand, and that the slayer must be under no obligation to make his own safety secondary to the safety of the person killed. And it was therefore held that a sailor on a vessel is not justified in killing a passenger in order to save himself.

(*d*) *Failure to Repair Highway.*—Other cases of necessity are clearer. Thus, a person cannot be held responsible for failure to repair or restore a highway, where all the materials with which the same might be repaired or restored have been swept away by the act of God, as by the sea, so that it is impossible for him to repair or restore it.[203]

(*e*) *Joining Rebellion.*—A person is not guilty in joining a rebellion, if it is necessary to save his life.[204]

(*f*) *Crew Deposing Master.*—The crew of a vessel are not guilty of a crime in arising and deposing the master, if it is a case of necessity.[205]

(*g*) *Stopping a Vehicle in Street.*—The driver of a vehicle is not liable for stopping in the street in violation of a statute, where he is unavoidably delayed by the crowding of other vehicles.[206]

---

[203] Reg. v. Bamber, 5 Q. B. 279, Beale's Cas. 356.

[204] See Respublica v. McCarty, 2 Dall. (Pa.) 86, Beale's Cas. 364; McGrowther's Case, Fost. C. L. 13, Beale's Cas. 273.

[205] U. S. v. Ashton, 2 Sumn. 13, Fed. Cas. No. 14,470.

[206] Com. v. Brooks, 99 Mass. 434; Beale's Cas. 364.

(*h*) *Selling Intoxicating Liquor.*—A physician or druggist who furnishes intoxicating liquors as a medicine, in good faith, and in a proper case, is not guilty under a statute punishing generally the sale of intoxicating liquors.[207]

(*i*) *Sunday Labor.*—And labor on Sunday may be justifiable in a case of necessity, notwithstanding a statute prohibiting and punishing labor on that day.[208]

83. Compulsion or Command.

(*a*) *In General.*—"An act which, if done willingly, would make a person a principal in the second degree, or an aider and abettor, in a crime, may be innocent if the crime is committed by a number of offenders, and if the act is done only because, during the whole of the time it is being done, the person who does it is compelled to do it by threats on the part of the offenders instantly to kill him, or to do him grevious bodily harm, if he refuses; but threats of future injury, or the command of any one not the husband of the offender, do not excuse any offense." [209]

---

[207] State v. Wray, 72 N. C. 253, Beale's Cas. 366.

[208] Com. v. Knox, 6 Mass. 76; post, § 451.

[209] Steph. Dig. Cr. Law, art. 31. See People v.

Illustrations.—According to this principle, a person who joins with others in a rebellion or in other treasonable acts is not criminally responsible therefor, if, during the whole time he is with them, he is compelled to remain and take part by threats of death or great bodily harm.[210] The same is true where a person is so compelled to go with a mob and to assist in the destruction of property, or to join in a riot.[211] It is very doubtful, however, whether fear of personal danger will excuse a man who joins in committing a homicide.[212]

(*b*) *Threats of Future Injury.*—Compulsion does not amount to a defense where the threats are of future injury only. The threatened injury must be present and impending.[213]

Repke, 103 Mich. 459. But see Reg. v. Tyler, 8 Car. & P. 616.

[210] See McGrowther's Case, Fost. C. L. 13, Beale's Cas. 273; Respublica v. McCarty, 2 Dall. (Pa.) 86, Beale's Cas. 364; Rex v. Gordon, 1 East, P. C. 71.

[211] Rex v. Crutchley, 5 Car. & P. 133, Beale's Cas. 367.

[212] Reg. v. Tyler, 8 Car. & P. 616.

[213] Steph. Dig. Cr. Law, art. 31; People v. Repke, 103 Mich. 459.

(*c*) *Threats of Injury to Property.*—And the only threats which will be sufficient to make out a case of compulsion are threats of injury to the person,—either death or grievous bodily harm. Fear of injury to property, as of having houses burned, crops destroyed, or goods taken, is not enough to excuse any offense.[214]

(*d*) *Continuance after Cessation of Danger.*—If a person joins others in a crime—as in rebellion, for instance—because of fear of death or grievous bodily harm, he must leave as soon as the cause of his fear and the fear cease. If he continues with them after this, he is guilty, and the compulsion at the outset is no defense.[215]

---

[214] McGrowther's Case, Fost. C. L. 13, Beale's Cas. 273; Respublica v. McCarty, 2 Dall. (Pa.) 86, Beale's Cas. 364. Indeed, in these two cases, which were cases of rebellion, it was said that nothing less than fear of immediate death was enough to excuse.

[215] In a case of rebellion it was said: "The only force that doth excuse is a force upon the person, and present fear of death; and this force and fear must continue all the time the party remains with the rebels. It is incumbent on every man, who makes force his defense, to show an actual force, and that he quitted the service as soon as he could; agreeably to the rule laid down in

(*e*) *Command of Husband.*—As will be shown in another section, a wife is not guilty of a crime, except in the case of treason or murder, if the act is done under coercion by her husband, and, if an act is committed by her in the presence of her husband, there is a rebuttable presumption of coercion.[216]

(*f*) *Command of Parent, Master, or Other Superior.*—The case of husband and wife is the only case in which the command of one person will justify or excuse a crime committed by another. If a child who is old enough and of intelligence enough to be criminally responsible commits a crime, it is no defense that he did so by command of his

---

Oldcastle's Case, that they joined pro timore mortis, et recesserunt quam cito potuerunt." McGrowther's Case, Fost. C. L. 13, 18 How. St. Tr. 391, Beale's Cas. 273. And see, to the same effect, Respublica v. McCarty, 2 Dall. (Pa.) 86, Beale's Cas. 364.

In Texas, a statute provides that, to render duress a defense to a criminal charge, the act must be done when the party threatening is "actually present." A person is actually present, within the meaning of this statute, if he is in such proximity to the place where the act is done as to have control over the person threatened. Paris v. State, 35 Tex. Cr. R. 82.

[216] Post, § 85, et seq.

parent.[217] The same is true of a crime committed by a servant or agent in obedience to the command of his master or principal;[218] of a crime committed by a soldier, sailor, or civilian, by command of his superior officer.[219] "In all cases in which force is used

---

[217] Steph. Dig. Crim. Law, art. 31; 1 Hawk. P. C., c. 1, §14; People v. Richmond, 29 Cal. 414 (larceny); Carlisle v. State, 37 Tex. Cr. R. 108 (poisoning of her infant child by girl of sixteen, because of request, command, or persuasion of her mother).

The command of the parent, however, may be taken into consideration by the jury, in connection with the age of the child, in determining whether the child knew that he was committing a crime. Com. v. Mead, 10 Allen (Mass.) 398; State v. Learnard, 41 Vt. 585. See post, § 88, et seq.

[218] 1 Hawk. P. C. c. 1, § 14; Com. v. Hadley, 11 Metc. (Mass.) 66, Beale's Cas. 372; Sanders v. State, 31 Tex. Cr. R. 525.

In Sanders v. State, supra, it was held that, where an employe of a railroad company knowingly obstructs a highway, he cannot escape responsibility by showing that he did so in obedience to the orders of his superior officer. And see Smith v. District of Columbia, 12 App. D. C. 33.

[219] U. S. v. Jones, 3 Wash. C. C. 209, Fed. Cas. No. 15,494, Beale's Cas. 368. In this case a first lieutenant on a privateer schooner was indicted for feloniously and piratically entering another vessel and assaulting the captain, and the defense

against the person of another, both the person who orders such force to be used and the person using that force is responsible for its use, and neither of them is justified by the circumstance that he acts in obedience to orders given him by a civil or military superior; but the fact that he does so act, and the fact that

---

was that he was acting in obedience to the orders of his superior officer. It was said by Mr. Justice Washington, in charging the jury: "No military or civil officer can command an inferior to violate the laws of his country, nor will such a command excuse, much less justify, the act. Can it be for a moment pretended that the general of an army, or the commander of a ship of war, can order one of his men to commit murder or felony? Certainly not. In relation to the navy, let it be remarked that the fourteenth section of the law for the better government of that part of the public force, which enjoins on inferior officers or privates the duty of obedience to their superior, cautiously speaks of the lawful orders of that superior. Disobedience of an unlawful order must not, of course, be punishable; and a court martial would, in such a case, be bound to acquit the person tried upon a charge of disobedience. We do not mean to go further than to say that the participation of the inferior officer in an act which he knows, or ought to know, to be illegal, will not be excused by the order of his superior."

See, also, Rex v. Thomas, 1 Russ. Crimes (9th Ed.) 823 4 Maule & S. 442, where a marine on a

the order was apparently lawful, are in all cases relevant to the question whether he believed, in good faith and on reasonable grounds, in the existence of a state of facts which would have justified what he did apart from such orders." [220]

84. Custom and Usage.

If a person does an act which is prohibited and punished by the common law or statute as a crime, he cannot escape responsibility by showing that it was the custom in the particular locality to do the act.[221]

Application of This Rule.—There are few cases in which this rule has been applied, but there can be no doubt of its soundness. It has been actually applied in some cases. Thus, it has been held, on a prosecution for larceny under certain circumstances, that it

---

man of war was held guilty of murder where he fired upon a boat which approached the ship after being warned away, and killed a person in it, though he acted in obedience to the orders of his officer. And see U. S. v. Carr, 1 Woods 480, Fed. Cas. No. 14,732; Com. v. Blodgett, 12 Metc. (Mass.) 56.

[220] Steph. Dig. Crim. Law, art. 202. See Reg. v. Trainer, 4 Fost. & F. 105, 1 Russ. Crimes, 878.

[221] Reg. v. Reed, 12 Cox, C. C. 1, Beale's Cas. 369; Com. v. Perry, 139 Mass. 198.

was no defense to show that it was the custom in the particular locality to take the goods of others under such circumstances.[222] So, on an indictment for a riot in making a great noise tumultuously, in the nighttime, by shouting and blowing horns or shooting off guns, as in a charivari, it is no defense to

[222] Hendry v. State, 39 Fla. 235; State v. Welch, 73 Mo. 284, 39 Am. Rep. 515; Lancaster v. State, 3 Cold. (Tenn.) 340, 91 Am. Dec. 288; Com. v. Doane, 1 Cush. (Mass.) 5; Lawrence v. State, 20 Tex. App. 536.

As was said in Hendry v. State, supra, there can be no legal custom to justify one man in stealing the property of another, as such a custom would be contrary to law, and bad.

A defendant indicted for larceny, in whose possession a portion of the cargo of a vessel is found, under circumstances which, if unexplained, would authorize a jury to presume a felonious taking by him, is not entitled, in order to negative the inference of an intent to steal, to give evidence of a custom for the officers of vessels to appropriate a small part of the cargo to themselves, or to prove that instances had occurred in which the mates of vessels, under a claim of right, had appropriated to themselves parts of the cargoes in their possession. Such evidence is inadmissible, because the custom, which it purports to prove, is wanting in the elements of a legal custom, and cannot be sustained as such. Com. v. Doane, 1 Cush. (Mass.) 5.

show that it was the custom to do such acts.[223] And on an indictment against a public officer for embezzlement in appropriating the public moneys unlawfully, a custom among public officers to use or appropriate moneys in such a way is no defense.[224] In an English case, custom to bathe at a certain place was set up by bathers to defeat a prosecution for unlawful and indecent exposure of their persons in the sight of others passing and repassing on a highway, and to the common nuisance of the subjects of the queen; but the custom, though shown to have existed for more than half a century without complaint, was held to be no defense.[225]

V. RESPONSIBILITY OF MARRIED WOMEN.

85. In General.—A married woman is criminally responsible for any offense committed of her own free will, but she is not responsible for offenses,

---

[223] Banku v. State, 4 Ind. 114. And see post, § 425.

[224] Bolin v. State, 51 Neb. 581, 595.

[225] Reg. v. Reed, 12 Cox, C. C. 1, Beale's Cas. 369. On a prosecution for maintaining a common nuisance by keeping a large number of swine in the neighborhood of certain dwellings and highways, it is no defense to show that it is a custom to tolerate the location of such establishments in populous localities. Com. v. Perry, 139 Mass. 198.

other than treason or murder, committed under coercion by her husband. There is a presumption of coercion, rebuttable by the state, if the husband was present when the offense was committed, or so near as to be able to exert an immediate control or influence.

It is a well-settled doctrine, said by Blackstone to have been recognized in England for at least a thousand years, that if a woman commits larceny, burglary, "or other civil offenses against the laws of society," [226] by the coercion of her husband, she is considered as acting under compulsion and not of her own will, and is not guilty of any crime; and, as we shall see, there is a rebuttable presumption of coercion if she commits an offense in the presence of her husband.[227]

86. Particular Offenses.

The principle that a woman is not responsible for offenses committed under coercion

---

[226] 4 Bl. Comm. 28. By this phrase, Blackstone meant to exclude treason, murder, and perhaps other offenses prohibited by the law of nature. See post, § 86.

[227] 4 Bl. Comm. 28; 1 Hale, P. C. 45; Anon., Lib. Ass'n, 137, pl. 40, Beale's Cas. 272; Anon., W. Kelyng 28, Beale's Cas. 273; Reg. v. Dykes; 15 Cox, C. C. 771, Beale's Cas. 274; Com. v. Neal, 10 Mass. 152, 6 Am. Dec. 105; and cases hereafter cited.

See valuable note in 33 Am. St. Rep. 89-96.

by her husband has been applied to larceny,[228] receiving stolen goods,[229] burglary,[230] arson,[231] robbery,[232] mayhem,[233] assault and battery,[234] forgery,[235] abortion,[236] uttering counterfeit money,[237] selling intoxicating liquors,[238] and having possession of burglars' tools.[239]

---

[228] Anon., Lib. Ass'n, 137, pl. 40, Beale's Cas. 272; Rex v. Knight, 1 Car. & P. 116; Seiler v. People, 77 N. Y. 413.

[229] State v. Houston, 29 S. C. 108; Goldstein v. People, 82 N. Y. 233.

[230] Anon., W. Kelyng, 28, Beale's Cas. 273.

[231] Davis v. State, 15 Ohio, 72, 45 Am. Dec. 559.

[232] Reg. v. Dykes, 15 Cox, C. C. 771, Beale's Cas. 274; Reg. v. Torpey, 12 Cox, C. C. 45; People v. Wright, 38 Mich. 744, 31 Am. Rep. 331; Quinlan v. People, 6 Park. Cr. R. (N. Y.) 9.

[233] Reg. v. Smith, Dears. & B. C. C. 553, 8 Cox, C. C. 27; State v. Ma Foo, 110 Mo. 7, 33 Am. St. Rep. 414.

[234] Com. v. Neal, 10 Mass. 152, 6 Am. Dec. 105; State v. Parkerson, 1 Strob. (S. C.) 169; Com. v. Gaunon, 97 Mass. 547; State v. Williams, 65 N. C. 398.

[235] People v. Ryland, 28 Hun (N. Y.) 568, 97 N. Y. 126.

[236] Tabler v. State, 34 Ohio St. 127.

[237] Rex v. Price, 8 Car. & P. 19; Conolly's Case, 2 Lewin, C. C. 229.

[238] Mulvey v. State, 43 Ala. 316, 94 Am. Dec. 684; Com. v. Burk, 11 Gray (Mass.) 437; State v.

The principle does not apply, however, to treason [240] or murder.[241] Nor does it apply to such misdemeanors as keeping a bawdy house. "A wife," said Hawkins, "may be indicted together with her husband, and condemned to the pillory with him, for keeping a bawdy house; for this is an offense as to the government of the house, in which the wife has a principal share, and also such an offense as may generally be presumed to be managed by the intrigues of her sex." [242]

87. Presumption of Coercion and Rebuttal Thereof.

When a woman commits an offense in the presence of her husband it is presumed that

---

Cleaves, 59 Me. 298, 8 Am. Rep. 422.

[239] State v. Potter, 42 Vt. 495.

[240] 1 Hale, P. C. 47; 4 Bl. Comm. 29.

[241] 4 Bl. Comm. 29; Anon., W. Kelyng, 28 Beale's Cas. 273 (citing the Case of the Earl of Somerset and his wife, who were found equally guilty of the murder of Sir Thomas Overby, by poisoning him in the Tower of London. 2 How. St. Tr. 951, 3 Co. Inst. 49). And see Reg. v. Manning, 2 Car. & K. 887; Bibb v. State, 94 Ala. 31, 33 Am. St. Rep. 88; State v. Ma Foo, 110 Mo. 7, 33 Am. St. Rep. 414. But see State v. Kelly, 74 Iowa, 589, which is to the contrary.

[242] 1 Hawk. P. C. c. 1, § 12. And see 4 Bl. Comm. 29.

she acted by his coercion, and she must be acquitted in the absence of evidence to the contrary.[243] But this presumption may always be rebutted by proof that she acted of her own free will, and not by his coercion, and, if this is shown, she is as fully responsible as a *feme sole*.[244] "The question of fact

---

[243] Anon., W. Kelyng, 28, Beale's Cas. 273; Rex v. Price, 8 Car. & P. 19; State v. Kelly, 74 Iowa, 589; Com. v. Burk, 11 Gray (Mass.), 437; Com. v. Gaunon, 97 Mass. 547; Com. v. Eagan, 103 Mass. 71; State v. Ma Foo, 110 Mo. 7, 33 Am. St. Rep. 414; State v. Williams, 65 N. C. 398; Davis v. State, 15 Ohio, 72, 45 Am. Dec. 559; State v. Potter, 42 Vt. 495.

In Arkansas, by force of a statute, the presence of the husband is no defense unless it affirmatively "appear from the circumstances in the case that violence, threats, commands, or coercion were used." Freel v. State, 21 Ark. 212.

[244] Reg. v. Torpey, 12 Cox, C. C. 45; Com. v. Daley, 148 Mass. 11, Beale's Cas. 275; State v. Cleaves, 59 Me. 298, 8 Am. Rep. 422; People v. Wright, 38 Mich. 744, 31 Am. Rep. 331; State v. Ma Foo, 110 Mo. 7, 33 Am. St. Rep. 414; Seiler v. People, 77 N. Y. 413; Goldstein v. People, 82 N. Y. 233; People v. Ryland, 28 Hun (N. Y.) 568, 97 N. Y. 126; State v. Williams, 65 N. C. 398; Tabler v. State, 34 Ohio St. 127; State v. Collins, 1 McCord (S. C.) 355; State v. Parkerson, 1 Strob. (S. C.) 169; Uhl v. Com. 6 Grat. (Va.) 706; Miller v. State, 25 Wis. 384.

to be determined is whether she really and in truth acted under such coercion, or whether she acted of her own free will and independently of any coercion or control by him." [245] When an offense is committed by a woman

---

In Com. v. Moore, 162 Mass. 441, it was held that since, under a statute, a wife could not be compelled to be a witness on an indictment against her husband, there was no presumption of coercion where a wife testified in favor of her husband on a criminal prosecution, and committed perjury. See Rex v. Dix, 1 Russ. Crimes 147.

A married woman may be indicted alone, or jointly with her husband, for keeping a bawdy house, gaming house, or liquor nuisance. Reg. v. Williams, 10 Mod. 63; Rex v. Dixon, 10 Mod. 335; Com. v. Tryon, 99 Mass. 442; State v. Collins, 1 McCord (S. C.) 355; State v. Bentz, 11 Mo. 27.

[245] Com. v. Daley, 148 Mass. 11, Beale's Cas. 275.

The fact that the wife is more active than the husband in committing the offense is evidence to be considered in determining whether she acted under his coercion, but it does not, as a matter of law, make her guilty, since the cause of her activity may have been her husband's influence, and, if it was so, she is not guilty. State v. Houston, 29 S. C. 108.

Where a wife choked a man, and told him to keep still, while her husband picked his pockets, it was held that the jury was justified in finding that she was not acting under coercion. People v. Wright, 38 Mich. 744, 31 Am. Rep. 331.

in the absence of her husband, coercion is not presumed, for no presumption arises from the mere fact of coverture; but coercion may be shown as a fact.[246] To give rise to the presumption of coercion, however, the presence of the husband need not have been at the very spot where the offense was committed, or even in the same room, but it is sufficient if he was near enough for the wife to be under his immediate control or influence.[247]

---

[246] 2 East, P. C. 559; Rex v. Morris, Russ. & R. 270; Reg. v. Cohen, 11 Cox, C. C. 99; Reg. v. John, 13 Cox, C. C. 100; Brown v. Attorney General, (1898) App. Cas. 234, 18 Cox, C. C. 658; State v. Nelson, 29 Me. 329; Com. v. Murphy, 2 Gray (Mass.) 510; Com. v. Munsey, 112 Mass. 287; Quinlan v. People, 6 Park. Cr. R. (N. Y.) 9; Seiler v. People, 77 N. Y. 413; State v. Shee, 13 R. I. 535; State v. Potter, 42 Vt. 495.

[247] Com. v. Burk, 11 Gray (Mass.) 437; Com. v. Munsey, 112 Mass. 287; Com. v. Flaherty, 140 Mass. 454. But see State v. Shee, 13 R. I. 535.

In Conolly's Case, 2 Lewin, C. C. 229, a wife went from house to house uttering base coin, her husband accompanying her, but remaining outside. It was held that she was not guilty.

It was said in a Massachusetts case: "No exact rule applicable to all cases can be laid down as to what degree of proximity will constitute such presence, because this may vary with the varying circumstances of particular cases. And

VI. RESPONSIBILITY OF INFANTS.

88. In General.—A child is not criminally responsible for his acts or omissions if he is of such tender years as to be incapable of distinguishing between right and wrong, and of understanding the nature of the particular act. At common law—

1. **Under the age of seven years the presumption of incapacity is conclusive.**
2. **Between the ages of seven and fourteen there is a presumption of incapacity, but it may be rebutted.**
3. **After the age of fourteen there is a presumption of capacity, which must be rebutted by the accused.**

Criminal and Civil Liability Distinguished.—With a few exceptions, a child is liable for his torts in a civil action to the same extent as an adult, for the object of the action

---

where the wife did not act in the direct presence of her husband, or under his eye, it must usually be left to the jury to determine incidentally whether his presence was sufficiently immediate or direct to raise the presumption. But the ultimate question, after all, is whether she acted under his coercion or control, or of her own free will, independently of coercion or control by him; and this is to be determined in view of the presumption arising from his presence, and of the testimony or circumstances tending to rebut it, if any such exist." Com. v. Daley, 148 Mass. 11, Beale's Cas. 275.

is to compensate the party injured, and not to punish the child, and his mental capacity, therefore, is generally immaterial. It is very different, however, when it is proposed to hold a child amenable to the criminal law, for then a criminal intent is necessary. A child is not criminally responsible unless he is old enough, and intelligent enough, to be capable of entertaining a criminal intent; and to be capable of entertaining a criminal intent he must be capable of distinguishing between right and wrong as to the particular act.

89. Children Under the Age of Seven Years.

Children under the age of seven years are, by an arbitrary rule of the common law, conclusively presumed to be *doli incapax,* or incapable of entertaining a criminal intent, and no evidence at all can be received to show capacity in fact.[248]

---

[248] This rule applies to both common law and statutory offenses. Reg. v. Smith, 1 Cox, C. C. 260, Beale's Cas. 276; Marsh v. Loader, 14 C. B. (N. S.) 535; State v. Goin, 9 Humph. (Tenn.) 175; People v. Townsend, 3 Hill (N. Y.) 479.

In Illinois, and perhaps in some other jurisdictions, the age under which a child is absolutely irresponsible has been raised by statute to ten years. Angelo v. People, 96 Ill. 209, 36 Am. Rep. 132.

90. Children Between the Ages of Seven and Fourteen.

Children between the ages of seven and fourteen are presumed to be incapable of entertaining a criminal intent, but the presumption is not conclusive, as in the case of children under the age of seven. It may be rebutted by showing in the particular case that the accused was of sufficient intelligence to distinguish between right and wrong, and to understand the nature and illegality of the particular act, or, as it is sometimes said, that he was possessed of "a mischievous discretion."[249] The burden of showing this is upon the state, and if no evidence at all is introduced on this point, or if the evidence does not show a knowledge of right and wrong, there must be an acquittal.[250] If

---

[249] 1 Hale, P. C. 26, 27; 4 Bl. Comm. 23. "Proof that he knew the difference between good and evil, or that he was possessed of the intelligence of ordinary boys of his age, does not fill the requirements of the law. It must be shown that he had sufficient discretion to understand the nature and illegality of the particular act constituting the crime." Carr v. State, 24 Tex. App. 562, 5 Am. St. Rep. 905.

[250] This rule applies in all cases, whether the offense be a felony, or a mere misdemeanor, and

such capacity is shown, a child over seven years of age is just as fully responsible as an adult, the maxim being, *"malitia supplet aetatem."*[251] Capacity must be shown beyond any reasonable doubt.[252]

---

whether it be a common-law or statutory offense. Reg. v. Smith, 1 Cox, C. C. 260, Beale's Cas. 276; Rex v. Owen, 4 Car. & P. 236; Reg. v. Vamplew, 3 Fost. & F. 520; Godfrey v. State, 31 Ala. 323, 70 Am. Dec. 494; Martin v. State, 90 Ala. 602, 24 Am. St. Rep. 844; Angelo v. People, 96 Ill. 209, 36 Am. Rep. 132; Heilman v. Com., 84 Ky. 457, 4 Am. St. Rep. 207; Com. v. Mead, 10 Allen (Mass.) 398; State v. Adams, 76 Mo. 355; State v. Tice, 90 Mo. 112; State v. Aaron, 4 N. J. Law, 231, 7 Am. Dec. 592; State v. Goin, 9 Humph. (Tenn.) 175; Carr v. State, 24 Tex. App. 562, 5 Am. St. Rep. 905; State v. Leanard, 41 Vt. 585; Law v. Com., 75 Va. 885, 40 Am. Rep. 750.

In Illinois, by statute, the age at which this rebuttable presumption of incapacity arises is between ten and fourteen. Angelo v. People, supra.

[251] "If the intelligence to apprehend the consequences of acts, to reason upon duty, to distinguish between right and wrong, if the consciousness of guilt and innocence be clearly manifested, then capacity is shown." Per Southard, J., in State v. Aaron, 4 N. J. Law, 231, 7 Am. Dec. 592, 601.

Whether a child had such capacity must generally be determined from his conduct, and the circumstances surrounding the commission of the

91. Children Over Fourteen Years of Age.

Children over fourteen years of age are in substantially the same position with regard to criminal responsibility as an adult. A child who has reached this age is presumed to be *doli capax,* and therefore responsible, unless he shows, as he may, that he was not

act. See Carr v. State, 24 Tex. App. 562, 5 Am. St. Rep. 905.

In York's Case, Fost. C. L. 70, a boy of ten years, who, after killing a little playmate, hid the body, was convicted of murder, and executed, and it was considered that the circumstances showed a consciousness of guilt, and knowledge of right and wrong. In another English case, a child of eight was convicted of arson. Emlyn on 1 Hale, P. C. 25, note n.

In this country, also, there are cases in which children of such tender years have been convicted, and even hanged. See State v. Guild, 10 N. J. Law, 163, 18 Am. Dec. 404, where a boy of twelve was hung for murder, and Godfrey v. State, 31 Ala. 323, 70 Am. Dec. 494, where a child of eleven was convicted of murder, and the conviction was sustained.

[252] The "evidence of that malice which is to supply age ought to be strong and clear, beyond all doubt and contradiction." 4 Bl. Comm. 24. And see Angelo v. People, 96 Ill. 209, 36 Am. Rep. 132; Law v. Com., 75 Va. 885, 40 Am. Rep. 750; Godfrey v. State, 31 Ala. 323, 70 Am. Dec. 494; State v. Tice, 90 Mo. 112.

of sufficient capacity. To escape responsibility, he has the burden of satisfying the jury that he did not have sufficient intelligence to understand the nature and consequences of his act, and to know that he was doing wrong.[253]

92. Incapacity Other Than Mental.

(*a*) *In General.*—There are some offenses which an infant cannot commit because of incapacity other than mental incapacity. Blackstone says: "The law of England in some cases privileges an infant under the age of twenty-one as to common misdemeanors, so as to escape fine, imprisonment, and the like, and particularly in cases of omission, as not repairing a bridge, or a highway, and other similar offenses; for, not having the command of his fortune till twenty-one, he

---

In Law v. Com., supra, a conviction of a boy of nearly twelve years as principal in the second degree in the crime of attempt to rape was set aside, where the only evidence of his mental capacity and guilty knowledge was that he was a boy of average capacity for his age (which, as the court said, amounted to nothing), and that he put his hand over the girl's mouth, while his elder brother attempted to rape her.

[253] State v. Goin, 9 Humph. (Tenn.) 175, and other cases cited in the preceding notes.

wants the capacity to do those things which the law requires." [254]

In a Michigan case it was held that a minor cannot be prosecuted and convicted for not supporting his wife, if there is no evidence that he was emancipated, or that he owned any property.[255]

(*b*) *Physical Incapacity.*—A boy cannot be guilty of rape, as principal in the first degree, unless he has physical capacity to have intercourse with a woman. At common law a boy under fourteen years of age was conclusively presumed to be incapable of committing this crime, but in this country some of the courts have repudiated this doctrine, and allow capacity in fact to be shown.[256]

(*c*) *Effect of Privilege as to Contracts.*—Since an infant is not bound by his contracts, it has been held by most of the courts that he cannot be made liable in an action for deceit when he obtains goods under a contract by false misrepresentations as to his age; and it has been contended that his privilege in this

---

[254] 4 Bl. Comm. 22; 1 Hale, P. C. 20-22.

[255] People v. Todd, 61 Mich. 234.

[256] Post, § 302(a).

respect renders him exempt from responsibility to the criminal law in these cases. It has been held, however, that his privileges do not exempt him from responsibility for his crimes, and an infant, if of sufficient mental capacity to be responsible, may be convicted of forgery, or counterfeiting, or cheating at common law, or obtaining goods by false pretenses, though he cannot be held civilly liable.[257] But it has been held that an infant cannot be guilty under a statute punishing any person who shall dispose of property upon which he has given a chattel mortgage, since an infant has a right to avoid a mortgage given by him, and a disposal of the property by him amounts to a disaffirmance of the mortgage.[258]

VII. RESPONSIBILITY OF INSANE PERSONS.

93. In General.—A man is not criminally responsible for his acts if he is so insane, either from lack or disease of the mind, as to be incapable of entertaining a criminal intent; but the courts do not agree entirely as to the proper test of insanity. The law may be summarized as follows:

---

[257] People v. Kendall, 25 Wend. (N. Y.) 399, 37 Am. Dec. 240.

[258] State v. Howard, 88 N. C. 650; State v. Plaisted, 43 N. H. 413; Jones v. State, 31 Tex. Cr. R. 252.

1. All courts now agree that a man is not criminally responsible for an act if, by reason of lack or disease of the mind, he was incapable of distinguishing between right and wrong with respect to the particular act.
2. Some courts, in addition to this, hold that a man is not responsible for an act if, by reason of disease of the mind, he was irresistibly impelled to do the act, though he may have known that the act was wrong. Other courts refuse to recognize such a ground of exemption.
3. A mere perverted condition of the moral system, called moral insanity, where the mind is not diseased, or mere uncontrollable passion, is no ground of exemption.

Criminal and Civil Liability Distinguished.—What has been said in reference to the difference between the criminal and civil liability of children is equally applicable to insane persons. An insane person is generally liable in a civil action for his torts, since the object of an action for a tort is compensation to the party injured, and not the punishment of the wrongdoer. It is otherwise, however, in a criminal prosecution, for a criminal intent must then be shown. It is therefore settled that a man is not criminally responsible for an act, if he was so insane, at

the time he committed the act, that he was incapable of entertaining a criminal intent. As to this there can be no question; but the courts do not agree entirely as to when a man is so insane as to be considered incapable of entertaining such an intent.

94. Tests of Responsibility in General.

Various tests have been laid down from time to time by judges and commentators for determining when a man is to be deemed so insane as to be irresponsible. Tests have been adopted and adhered to long enough to give a few precedents, and then abandoned for new ones; and these in turn have been abandoned for others, as discoveries in medical science have shown them to be erroneous. Unfortunately, however, the courts have not always kept pace with the progress of thought and discovery in medical science, and the result is that there is now a direct conflict in the decisions as to the true test of responsibility.

Abandoned Tests.—Sir Matthew Hale said, in effect, that though a man may be laboring under mental defect or disease, yet, if he has as great understanding as a child of fourteen years, he is responsible for his

acts.[259] This test, however, though it has at times been recognized by the courts,[260] has long ago been abandoned as too vague and uncertain for practical application.[261] Another test, announced by an English judge nearly two centuries ago, is called the "wild beast test." He charged a jury that a man, to be exempt from responsibility, "must be a man that is totally deprived of his reason and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast." [262] This test is not now recognized in any jurisdiction. To render a man irresponsible on the ground of insanity, his reason need not be totally dethroned.[263]

95. Capacity to Distinguish between Right and Wrong.

In many jurisdictions, if not in most, the sole test of responsibility, when insanity is set up as a defense, is the capacity of the ac-

---

[259] 1 Hale, P. C. 30.

[260] See State v. Richards, 39 Conn. 591, Beale's Cas. 238; where this test was given to the jury on a prosecution of a weak-minded person for arson.

[261] See the cases cited under § 95 et seq.

[262] Mr. Justice Tracy's charge to the jury in 1724 in Arnold's Case, 16 How. St. Tr. 764.

[263] See State v. Richards, 39 Conn. 591, Beale's Cas. 238, and cases hereafter cited.

cused to distinguish between right and wrong as to the particular act at the time it was committed. As we shall presently see, some courts go further. The leading case on insanity as a defense in criminal prosecutions arose in England in 1843, and is known as "McNaghten's Case."[264] One McNaghten killed the private secretary of Sir Robert Peel, the premier of England, mistaking him for the premier, and was acquitted of murder on the ground of insanity. This caused so much public excitement that the question of insanity as a defense came up on debate in the house of lords, and the lords addressed certain questions to the judges. In reply the judges said that, "to establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature or quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong."

This statement has since been accepted as

[264] McNaghten's Case, 10 Clark & F. 200, 1 Car. & K. 130, Beale's Cas. 231.

the law in England,[265] and in many of our states it has been adopted as the only test.[266] In all states it is recognized as far as it goes;[267] but, as will be shown in a subsequent section, some courts go further than this, and hold that a person is not criminally responsible for an act if done solely by reason of an insane irresistible impulse, though he may have known that it was both morally and legally wrong.[268]

The knowledge of right and wrong test is capacity to distinguish between right and

---

[265] See Reg. v. Haynes, 1 Fost. & F. 666, Beale's Cas. 234; Reg. v. Law, 2 Fost. & F. 836; Reg. v. Tounley, 3 Fost. & F. 839.

[266] Flanagan v. People, 52 N. Y. 467, 11 Am. Rep. 731, Beale's Cas. 241; Cunningham v. State, 56 Miss. 269, 31 Am. Rep. 360; People v. Hoin, 62 Cal. 120, 45 Am. Rep. 651. And see post, § 97, note 280.

[267] Com. v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458, Beale's Cas. 235; Freeman v. People, 4 Denio (N. Y.) 9, 47 Am. Dec. 216; Brinkley v. State, 58 Ga. 296; Williams v. State, 50 Ark. 511; U. S. v. Lee, 4 Mackey (D. C.) 489, 54 Am. Rep. 293; Carter v. State, 12 Tex. 500, 62 Am. Dec. 539; Thomas v. State, 40 Tex. 60, 63; Hawe v. State, 11 Neb. 537, 38 Am. Rep. 375; State v. Bundy, 24 S. C. 439, 58 Am. Rep. 263; and cases hereafter cited.

[268] Post, § 97 b.

wrong, not in the abstract, but as to the particular act. If such capacity existed, the accused is fully responsible, though in other respects he may have been insane.[269]

Mere Weakness of Mind, where there is sufficient capacity to know that the act is wrong, is no ground of exemption.[270]

---

[269] McNaghten's Case, 10 Clark & F. 200, 1 Car. & K. 130, Beale's Cas. 231; Freeman v. People, 4 Denio (N. Y.) 9, 47 Am. Dec. 216; Bolling v. State, 54 Ark. 588; Guiteau's Case, 10 Fed. 161; Thomas v. State, 40 Tex. 60, 63; post, § 96b.

The capacity to plan a crime does not necessarily imply sanity. And it has been held wrong, therefore to instruct the jury that a person accused of homicide is responsible, if he had sufficient power of mind "to deliberate and premeditate a design to effect the death" of the deceased. Bennett v. State, 57 Wis. 69, 46 Am. Rep. 26.

It has been held that there is no grade of insanity sufficient to acquit of murder, but not of manslaughter. U. S. v. Lee, 4 Mackey (D. C.) 489, 54 Am. Rep. 293. But see Anderson v. State, 43 Conn. 514, 21 Am. Rep. 669.

[270] Patterson v. People, 46 Barb. (N. Y.) 625; Wartena v. State, 105 Ind. 445; Conway v. State, 118 Ind. 482; Travers v. U. S., 6 App. D. C. 450; State v. Flowers, 58 Kan. 702.

"While a slight departure from a well-balanced mind may be pronounced insanity in medical science, yet such a rule cannot be recognized in the administration of the law when a person is

Ability to Comprehend Ingredients of Offense.—But when a person is in fact of unsound mind, it is necessary, in order that he may be capable of committing a crime, that he shall have sufficient mind "to see all the essential ingredients of the offense, and acknowledge their existence." [271]

96. Insane Delusion.

(*a*)*In General.*—A man may be insane as

---

on trial for the commission of a high crime. The just and necessary protection of society requires the recognition of a rule which demands a greater degree of insanity to exempt from punishment." Per Chief Justice Mercur in Taylor v. Com., 109 Pa. St. 262, 271.

It is proper to refuse to charge the jury that the mental condition of the accused, to render him responsible, "must have been such that he was capable of a careful weighing of reasons in order to a decision." State v. Swift, 57 Conn. 496.

Mere oddity or hypochondria is not insanity. Hawe v. State, 11 Neb. 537, 38 Am. Rep. 375.

[271] People v. Cummins, 47 Mich. 334. For this reason, in the case cited, where temporary insanity was set up as a defense in the prosecution for larceny, it was held erroneous to charge that, if the accused knew enough to know that he was taking property that did not belong to him, he was sane enough to be guilty. He might have had mind enough to know this, it was said, and yet not enough to fraudulently intend to deprive the owner permanently of his property.

to certain objects, or on certain subjects only, and perfectly sane with respect to other objects and on other subjects. In such a case he labors under partial insanity, or insane delusions. Because of disease of the mind he sees objects in a false light, or believes in the existence of facts which do not exist. This phase of insanity was also covered by the answer of the judges in the McNaghten Case, referred to in the preceding section. They said: In case "he labors under a partial delusion only, and is not in other respects insane, he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment." [272]

---

[272] McNaghten's Case, 10 Clark & F. 200, 1 Car. & K. 130, Beale's Cas. 231.

Ability to Comprehend Ingredients of Offense.—But when a person is in fact of unsound mind, it is necessary, in order that he may be capable of committing a crime, that he shall have sufficient mind "to see all the essential ingredients of the offense, and acknowledge their existence." [271]

96. Insane Delusion.

(*a*)*In General.*—A man may be insane as

---

on trial for the commission of a high crime. The just and necessary protection of society requires the recognition of a rule which demands a greater degree of insanity to exempt from punishment." Per Chief Justice Mercur in Taylor v. Com., 109 Pa. St. 262, 271.

It is proper to refuse to charge the jury that the mental condition of the accused, to render him responsible, "must have been such that he was capable of a careful weighing of reasons in order to a decision." State v. Swift, 57 Conn. 496.

Mere oddity or hypochondria is not insanity. Hawe v. State, 11 Neb. 537, 38 Am. Rep. 375.

[271] People v. Cummins, 47 Mich. 334. For this reason, in the case cited, where temporary insanity was set up as a defense in the prosecution for larceny, it was held erroneous to charge that, if the accused knew enough to know that he was taking property that did not belong to him, he was sane enough to be guilty. He might have had mind enough to know this, it was said, and yet not enough to fraudulently intend to deprive the owner permanently of his property.

to certain objects, or on certain subjects only, and perfectly sane with respect to other objects and on other subjects. In such a case he labors under partial insanity, or insane delusions. Because of disease of the mind he sees objects in a false light, or believes in the existence of facts which do not exist. This phase of insanity was also covered by the answer of the judges in the McNaghten Case, referred to in the preceding section. They said: In case "he labors under a partial delusion only, and is not in other respects insane, he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment." [272]

---

[272] McNaghten's Case, 10 Clark & F. 200, 1 Car. & K. 130, Beale's Cas. 231.

(*b*) *Connection between the Delusion and the Act.*—In all cases of delusion, the delusion must be connected with the act in the relation of cause and effect. A man is not exempt from responsibility merely because he is partially insane. If he does an act, the nature of which he understands, and which he knows to be wrong, he is none the less responsible because he is insane on other subjects.[278]

Thurman v. State, 32 Neb. 224; People v. Hubert, 119 Cal. 216; State v. Lewis, 20 Nev. 333.

[277] Bolling v. State, 54 Ark. 588.

This rule was also applied by the New York court of appeals in the late case of People v. Taylor, 138 N. Y. 398, where a convict had killed a fellow convict under an alleged insane delusion that the deceased was spying upon him, and had divulged a plan to escape.

And in People v. Hubert, 119 Cal. 216, it was applied where a husband killed his wife under an alleged insane delusion, for several months, that she was putting poison in his food.

[278] McNaghten's Case, 10 Clark & F. 200, 1 Car. & K. 130, Beale's Cas. 231; Guiteau's Case, 10 Fed. 161; Freeman v. People, 4 Denio (N. Y.) 9, 47 Am. Dec. 216; Wilcox v. State, 94 Tenn. 106; Bovard v. State, 30 Miss. 600; Ford v. State, 73 Miss. 734; People v. Coffman, 24 Cal. 230; State v. Geddis, 42 Iowa, 264; State v. Hockett, 70 Iowa, 442, 446; State v. Danby, 1 Houst. C. C. (Del.) 166; Dejarnette v. Com., 75 Va. 867, 877; State v.

(*c*) *Erroneous Belief Based upon Reasoning and Reflection.*—A delusion, to be an *insane* delusion, so as to exempt a man from responsibility, must be the result of disease of the mind rendering him incapable of reason with respect to the object of the delusion. It must be an *unreasoning* belief in the existence of facts, and not merely an erroneous belief based upon reasoning and reflection. This distinction was brought out with admirable clearness by Judge Cox in his charge to the jury in the Guiteau Case. An opinion, he said, however erroneous or absurd, formed upon reasoning and reflection, or examination of evidence, is not an insane delusion, and never exempts a man from responsibility for his acts. If a man, from mental disease, should believe that God had appeared to him, and commanded him to kill his child as a sacrifice, this would be an insane delusion, and, if he should sacrifice his child in obedience to the supposed command of the Almighty, he would not be responsible for the homicide; but if a man, by reading newspapers and by reasoning, however absurdly, should come to

---

Maier, 36 W. Va. 757; State v. Huting, 21 Mo. 464; U. S. v. Ridgeway, 31 Fed. 144.

the conclusion that the good of the country required the removal of the president, and should assassinate him, he would be guilty of murder.[279]

---

[279] It was further said by Judge Cox in the Guiteau case: "The important thing is that an insane delusion is never the result of reasoning and reflection. It is not generated by them, and it cannot be dispelled by them. A man may reason himself, and be reasoned by others, into absurd opinions, and may be persuaded into impracticable schemes and vicious resolutions, but he cannot be reasoned or persuaded into insanity or insane delusions. Whenever convictions are founded on evidence, or comparison of facts and opinions and arguments, they are not insane delusions. The insane delusion does not relate to mere sentiments or theories on abstract questions in law, politics, or religion. All these are subjects of opinions, which are beliefs founded on reasoning and reflection. * * * When men reason, the law requires them to reason correctly, as far as their practical duties are concerned. When they have the capacity to distinguish between right and wrong, they are bound to do it. Opinions, properly so called, i. e., beliefs resulting from reasoning, reflection, or examination of evidence, afford no protection against the penal consequences of crime. * * * A man may reason himself into a conviction of the expediency and patriotic character of political assassination, but to allow him to find shelter behind that belief, as an insane delusion, would be monstrous." Guiteau's

97. Insane Irresistible Impulse.

(*a*) *View That It is no Defense.*—Whether or not an insane irresistible impulse to do an act exempts one from responsibility, when he has the capacity to distinguish between right and wrong, and does know, when he does the act, that it is wrong, is a question upon which the courts do not agree. The English courts, since the McNaughten Case, and many of the courts in this country, refuse to recognize this condition of the mind as a ground of exemption, but limit the test to the capacity to distinguish between right and wrong as to the particular act. Some of them, even in the face of medical testimony to the contrary, refuse to recognize the existence of such a mental condition as an *insane* irresistible impulse to do an act known to be wrong, but regard it as mere moral perversion. These courts hold that the only test of responsibility is the capacity to know that the act is wrong, and that a man who has such capacity is fully responsible, no matter what impulse may have driven him to do the act.[280]

Case, 10 Fed. 161. And see State v. Lewis, 20 Nev. 333.

[280] McNaghten's Case, 10 Clark & F. 200, 1 Car.

(*b*) *Contrary and More Reasonable View.*—This position cannot be sustained in reason, and is opposed to the plainest principles of law. On questions like this the courts must keep pace with the progress of thought and discovery in medical science. They cannot blindly and obstinately refuse to recognize a

---

& K. 130, Beale's Cas. 231; Reg. v. Haynes, 1 Fost. & F. 666, Beale's Cas. 234; People v. Hoin, 62 Cal. 120, 45 Am. Rep. 651; People v. Hubert, 119 Cal. 216; Spencer v. State, 69 Md. 28, 37; State v. Scott, 41 Minn. 365; Cunningham v. State, 56 Miss. 269, 31 Am. Rep. 360; State v. Pagels, 92 Mo. 301, 317; State v. Miller, 111 Mo. 542; State v. Soper, 148 Mo. 217; Hawe v. State, 11 Neb. 537, 38 Am. Rep. 375; State v. Lewis, 20 Nev. 333 (collecting the cases pro and con); Genz v. State, 59 N. J. Law, 488; Mackin v. State, 59 N. J. Law, 495; Flanagan v. People, 52 N. Y. 467, 11 Am. Rep. 731, Beale's Cas. 241; People v. Carpenter, 102 N. Y. 238, 38 Hun, 490; Freeman v. People, 4 Denio (N. Y.) 9, 47 Am. Dec. 216; State v. Alexander, 30 S. C. 74, 14 Am. St. Rep. 879; State v. Bundy, 24 S. C. 439, 58 Am. Rep. 263; State v. Levelle, 34 S. C. 120, 131; Wilcox v. State, 94 Tenn. 106; State v. Harrison, 36 W. Va. 729.

In Texas it has been held that an irresistible impulse is no defense. Leache v. State, 22 Tex. App. 279, 58 Am. Rep. 638; Carter v. State, 12 Tex. 500, 62 Am. Dec. 539; Williams v. State, 7 Tex. App. 163. And yet kleptomania ("an uncontrollable propensity to steal") has been held a de-

phase of insanity, and adhere to old tests of responsibility, merely because such a state of mind was unknown to medical science half a century ago. Experts in the science of medicine, who certainly are better qualified to speak on the subject than the judges, virtually agree that *disease* of the mind, as distinguished from mere moral perversion, may irresistibly impel a man to the commission of a deed, while it leaves him with sufficient capacity to know that the deed is both morally and legally wrong. Thus, they say that a man may be afflicted with kleptomania, or an insane irresistible impulse to steal, with pyromania, or an insane irresistible impulse to burn buildings, etc., or with homicidal mania, or an insane irresistible impulse to kill. If, as a fact, such a condition of the mind can and does exist, it must follow that a man who

---

fense in a prosecution for larceny. Harris v. State, 18 Tex. App. 287; Looney v. State, 10 Tex. App. 520, 38 Am. Rep. 646.

In New York, the Penal Code exempts a man on the ground of insanity only where "he was laboring under such a defect of reason as either (1) not to know the nature and quality of the act he was doing, or (2) not to know that the act was wrong." Pen. Code N. Y. § 21. See People v. Taylor, 138 N. Y. 398.

commits an act *solely* by reason of it is not responsible. No fault can be imputed to the victim of such a disease. The act, because of *mental disease,* is *involuntary,* and no principle of law is better settled than the principle that a man is not to be punished for his involuntary acts. And surely he should not be punished for his mental disease. The only ground upon which the courts can refuse to recognize an exemption from responsibility in such cases is that such a state of mind cannot result from mental disease, and to take this position they must disregard the line between the respective provinces of the court and the jury. Medical experts say that such a state of mental disease does exist. Whether it did exist in any particular case, therefore, is a question of fact for the jury. There are well-considered cases in which this view of the question has been taken, and in which it has been held that a man is not responsible for an act done under and *solely* by reason of an *insane and irresistible* impulse, though he may have known that it was wrong.[281]

[281] Parsons v. State, 81 Ala. 577, 60 Am. Rep. 193, Beale's Cas. 242; Williams v. State, 50 Ark. 511; Bolling v. State, 54 Ark. 588; Green v. State, 64 Ark. 523; Flanagan v. State, 103 Ga. 619; Dacey

In order that a person may be exempt on the ground of irresistible impulse, the im-

---

v. People, 116 Ill. 555; Stevens v. State, 31 Ind. 485, 99 Am. Dec. 634; Plake v. State, 121 Ind. 433, 16 Am. St. Rep. 408; State v. Felter, 25 Iowa, 67; Scott v. Com. 4 Metc. (Ky.) 227, 83 Am. Dec. 461; Shannahan v. Com., 8 Bush (Ky.) 463, 8 Am. Rep. 465; Com. v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458, Beale's Cas. 235; State v. Pike, 49 N. H. 399, 6 Am. Rep. 533; State v. Jones, 50 N. H. 369, 9 Am. Rep. 242; Blackburn v. State, 23 Ohio St. 146, 165; Com. v. Mosler, 4 Pa. St. 264; Coyle v. Com., 100 Pa. St. 573, 45 Am. Rep. 397; Taylor v. Com., 109 Pa. St. 262; Com. v. Wireback, 190 Pa. St. 138; Dejarnette v. Com., 75 Va. 867, 877.

In Com. v. Mosler, 4 Pa. St. 264, it was said by Chief Justice Gibson: "There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees, but cannot avoid, and placing it under coercion, which, while its results are clearly perceived, is incapable of resistance. The doctrine which acknowledges this mania is dangerous in its relations, and can be recognized only in the clearest cases. It ought to be shown to have been habitual, or at least to have evinced itself in more than a single instance." This was approved in Coyle v. Com., 100 Pa. St. 573, 45 Am. Rep. 397.

Compare Scott v. Com., 4 Metc. (Ky.) 227, 83 Am. Dec. 461, where it was held that the disease need not have manifested itself in former acts of like character.

Leading Case: In Parsons v. State, 81 Ala. 577,

pulse must be the result of disease of the

---

60 Am. Rep. 193, Beale's Cas. 242, the leading authorities and cases on insanity as a defense were exhaustively reviewed, and it was held, on reasoning that is unanswerable, that, if there is such a state of mind as insane irresistible impulse, it must constitute an exemption from responsibility, and that the court has no right to say that it does not exist, but must leave that question to the jury. It was said: "We think that the inquiries to be submitted to the jury, in every criminal trial where the defense of insanity is interposed are these:

First: Was the defendant, at the time of the commission of the alleged crime, as a matter of fact, afflicted with a disease of the mind, so as to be either idiotic or otherwise insane?

Second: If such be the case, did he know right from wrong, as applied to the particular act in question? If he did not have such knowledge, he is not legally responsible.

Third. If he did have such knowledge, he may nevertheless not be legally responsible if the two following conditions concur: (1) If, by reason of the duress of such mental disease, he had so far lost the power to choose between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed; (2) and if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it solely."

This doctrine was clearly recognized by Lord Denman in England before the McNaghten Case,

mind;[282] and it must be irresistible, or, in other words, the disease must exist "to such

---

referred to in a preceding section. In Reg. v. Oxford, 9 Car. & P. 525, he said, referring to the accused: "If some controlling disease was in truth the acting power within him, which he could not resist, then he will not be responsible."

It has been objected that it is difficult to apply this rule; but, as was said by Judge Sommerville in Parsons v. State, supra, the difficulty does not lie in the rule, but is inherent in the subject of insanity itself; and the same objection applies to the "right and wrong test," and will apply to any other test.

In Hopps v. People, 31 Ill. 385, 83 Am. Dec. 231, the supreme court of Illinois, after expressing doubt as to what the rule or tests should be in cases of alleged insanity, laid down this rule: "Whenever it should appear from the evidence that, at the time of doing the act charged, the prisoner was not of sound mind, but affected with insanity, and such affection was the efficient cause of the act, and that he would not have done the act but for that affection, he ought to be acquitted. But this unsoundness of mind, or affection of insanity, must be of such a degree as to create an uncontrollable impulse to do the act charged, by overriding the reason and judgment, and obliterating the sense of right and wrong as to the particular act done, and depriving the accused of the power of choosing between them." And see Dacey v. People, 116 Ill. 555.

[282] Bolling v. State, 54 Ark. 588; Parsons v.

an extent as to subjugate the intellect, and render it impossible for the person to do otherwise than yield thereto." [283] The act must have been the product of the disease solely.[284]

98. Moral and Emotional Insanity, So Called.

Whenever irresistible impulse is relied upon as a defense, care must be taken to distinguish between *insane* irresistible impulse —that is, irresistible impulse resulting from *disease* of the mind—and mere moral perversion and passion. The expression "moral insanity" is often used, but, strictly speaking, it is not insanity at all. It is merely a perverted or abnormal condition of the moral system, where the mind is sound. It is well settled that there is no exemption from responsibility merely because of moral insanity, or because of ungovernable passion, sometimes called "emotional insanity." [285]

State, 81 Ala. 577, 60 Am. Rep. 193, Beale's Cas. 242, and other cases cited in the note preceding; and post, § 98.

[283] Taylor v. Com., 109 Pa. St. 262. And see Scott v. Com. 4 Metc. (Ky.) 227, 83 Am. Dec. 461; Com. v. Wireback, 190 Pa. St. 138.

[284] Parsons v. State, 81 Ala. 577, 60 Am. Rep. 193, Beale's Cas. 242; Green v. State, 64 Ark. 523.

[285] Parsons v. State, 81 Ala. 577, 60 Am. Rep. 193, Beale's Cas. 242; Boswell v. State, 63 Ala.

99. Periodical Insanity.

A man may be periodically insane,—that is, insane at times only, with lucid intervals. When such a man is charged with a crime, the question is, what was his mental condition at the very time the act was committed? His condition then, and not before or afterwards,

---

307, 35 Am. Rep. 20; Bolling v. State, 54 Ark. 588; Williams v. State, 50 Ark. 511; People v. Kerrigan, 73 Cal. 222; Choice v. State, 31 Ga. 424, 473, Beale's Cas. 269; Plake v. State, 121 Ind. 433, 16 Am. St. Rep. 408; Goodwin v. State, 96 Ind. 550; Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99; State v. Mewherter, 46 Iowa, 88; State v. Felter, 25 Iowa, 67; Spencer v. State, 69 Md. 28, 37; People v. Mortimer, 48 Mich. 37; People v. Finley, 38 Mich. 482; People v. Foy, 138 N. Y. 664; State v. Murray, 11 Or. 413, 6 Cr. Law Mag. 255; Taylor v. Com., 109 Pa. St. 262; Lynch v. Com., 77 Pa. St. 205, 213; State v. Levelle, 34 S. C. 120, 131; Leache v. State, 22 Tex. App. 279, 58 Am. Rep. 638.

Construing the language of the court literally, moral insanity seems to have been regarded as a defense in Scott v. Com., 4 Metc. (Ky.) 227, 83 Am. Dec. 461, but there can be little doubt that the court meant insane irresistible impulse.

In a Connecticut case it was said that moral insanity may reduce a homicide from murder in the first degree to murder in the second degree. Andersen v. State, 43 Conn. 514, 21 Am. Rep. 669. But see U. S. v. Lee, 4 Mackey (D. C.) 489, 54 Am. Rep. 293.

determines his responsibility,[286] though, of course, his condition before and afterwards may be considered in determining his condition at the time, and may give rise to presumptions.

VIII. RESPONSIBILITY OF DRUNKEN PERSONS.

100. In General.—Drunkenness furnishes no ground of exemption from responsibility for crime except in the following cases:

1. **Where it was involuntary, and so excessive as to temporarily deprive the accused of his reason.**
2. **Where the act was done while suffering from settled insanity or delirium tremens.**
3. **Where it negatives the commission of the act by the accused.**
4. **Where it negatives the existence of a specific intent, or of a knowledge of facts, which is an essential element of the crime charged.**
5. **In prosecutions for murder, evidence that the accused was drunk is immaterial, except for the following purposes:**
   (a) By the weight of authority, it may be

---

[286] U. S. v. Sickles, 2 Hayw. & H. 319, Fed. Cas. No. 16287a; Guiteau's Case, 10 Fed. 161; Freeman v. People, 4 Denio (N. Y.) 9, 47 Am. Dec. 216; State v. Spencer, 21 N. J. Law, 196; Com. v. Winnemore, 1 Brewst. (Pa.) 356.

considered in determining whether he acted under provocation and not from malice, if there was provocation, but not otherwise.

(b) And by the weight of authority, it may be considered for the purpose of determining whether he was capable of the premeditation and deliberation, or the specific intent to kill, necessary to constitute murder in the first degree.

101. Voluntary Drunkenness.

(*a*) *In General.*—No rule of law is more firmly established, and few have been more frequently applied, than the rule that voluntary drunkenness does not exempt a man from criminal responsibility for his acts. A drunken man is as fully responsible for his acts as a sober man, though he may have been so drunk as to be temporarily deprived of his reason and rendered incapable of knowing what he was doing, unless the fact of drunkenness negatives the existence of a specific intent or knowledge, which is an essential ingredient of the particular offense charged, or unless the accused was suffering from *delirium tremens,* or settled insanity resulting from previous habits of intemperance. "This vice," said Sir Matthew Hale, "doth

deprive a man of his reason, and puts many men into a perfect, but temporary, frenzy; but by the laws of England such a person shall have no privileges by his voluntary contracted madness, but shall have the same judgment as if he were in his right senses."[287]

---

[287] 1 Hale, P. C. 32. And see 1 Inst. 247; 3 Inst. 46; 4 Bl. Comm. 25, 26; Beverley's Case, 4 Coke, 125a; Pearson's Case, 2 Lewin, C. C. 144, Beale's Cas. 261; Burrow's Case, 1 Lewin, C. C. 75; Choice v. State, 31 Ga. 424, 472, Beale's Cas. 269; People v. Rogers, 18 N. Y. 9, 72 Am. Dec. 484, Beale's Cas. 264.

The doctrine is applied in the following cases: U. S. v. McGlue, 1 Curt. 1; Fed. Cas. No. 15,679; U. S. v. Drew, 5 Mason, 28, Fed. Cas. No. 14,993; Beasley v. State, 50 Ala. 149, 20 Am. Rep. 292; Chrisman v. State, 54 Ark. 283, 26 Am. St. Rep. 44; People v. Ferris, 55 Cal. 588; Garner v. State, 28 Fla. 113, 29 Am. St. Rep. 232; Beck v. State, 76 Ga. 452, 470; Rafferty v. People, 66 Ill. 118; Upstone v. People, 109 Ill. 169; Goodwin v. State, 96 Ind. 550; Shannahan v. Com., 8 Bush. (Ky.) 463, 8 Am. Rep. 465; State v. Kraemer, 49 La. Ann. 766; Com. v. Hawkins, 3 Gray (Mass.) 463; Com. v. Malone, 114 Mass. 295; People v. Garbutt, 17 Mich, 9, 97 Am. Dec. 162; Roberts v. People, 19 Mich. 401; State v. Welch, 21 Minn. 22; Warner v. State, 56 N. J. Law, 686, 44 Am. St. Rep. 415; Flanigan v. People, 86 N. Y. 554, 40 Am. Rep. 556; State v. John, 8 Ired. (N. C.) 330, 49 Am. Dec. 396; State v. Bundy, 24 S. C. 439, 58 Am. Rep. 263; Evers v.

(*b*) *Does not Aggravate Offense.*—Lord Coke said that drunkenness, instead of ex-

State, 31 Tex. Cr. R. 318, 37 Am. St. R. 811; Carter v. State, 12 Tex. 500, 62 Am. Dec. 539; State v. Tatro, 50 Vt. 483; Boswell v. Com. Grat. (Va.) 860; Willis v. Com. 32 Grat. (Va.) 929; State v. Robinson, 20 W. Va. 713, 43 Am. Rep. 799; State v. Shores, 31 W. Va. 491, 13 Am. St. Rep. 875.

"If a man chooses to get drunk," said Baron Alderson, "it is his own voluntary act. It is very different from madness, which is not caused by any act of the person. That voluntary species of madness which it is in a party's power to abstain from, he must answer for." Rex v. Meakin, 7 Car. & P. 297.

"Such a principle is absolutely essential to the protection of life and property. In the forum of conscience, there is no doubt considerable difference between a murder deliberately planned and executed by a person of unclouded intellect, and the reckless taking of life by one infuriated by intoxication; but human laws are based upon considerations of policy, and look rather to the maintenance of personal security and social order than to an accurate discrimination as to the moral qualities of individual conduct. But there is, in truth, no injustice in holding a person responsible for his acts committed in a state of voluntary intoxication. It is a duty which every one owes to his fellow men and to society, to say nothing of more solemn obligations, to preserve, so far as it lies in his own power, the inestimable gift of reason. If it is perverted or destroyed by fixed dis-

empting a man from criminal responsibility, aggravates the offense,[288] but this is not the law.[289]

102. Use of Morphine and Cocaine.

It would seem clear that if a person voluntarily uses morphine and cocaine, not as a medicine, but for the same reason for which one uses intoxicating liquors to excess, and thereby puts himself in such a condition as to be unable to reason or to distinguish between right and wrong, he should occupy precisely the same position as one who voluntarily becomes drunk by the use of intoxicating liquors. There seems to be no good reason for making any distinction. It has been held, however, in a late Texas case, that the rule is not the same, and that a person who is in such a condition by reason of the recent and voluntary use of morphine and cocaine, even in

ease, though brought on by his own vices, the law holds him not accountable. But if, by a voluntary act, he temporarily casts off the restraints of reason and conscience, no wrong is done him if he is considered answerable for any injury which, in that state, he may do to others or to society." Per Denio, J., in People v. Rogers, 18 N. Y. 9, 72 Am. Dec. 484, Beale's Cas. 264.

[288] 3 Inst. 46; Beverley's Case, 4 Coke, 125 a.

[289] McIntyre v. People, 38 Ill. 514.

conjunction with the use of intoxicating liquors, is not responsible.[290]

103. Drunkenness of Insane Person.

If a person is insane to such an extent as to be irresponsible, under the rules governing the criminal responsibility of insane persons,[291] the fact that he is also voluntarily drunk at the time he commits an act does not render him responsible. "It is as possible for an insane man to get drunk as a sane one. The addition of drunkenness to insanity does does not withdraw from such person the protection due to insanity, but, where a person commits homicide during drunkenness, reliance must be placed upon the original in-

---

[290] Edwards v. State, 38 Tex. Cr. R. 386. In this case, the charge was assault with intent to murder, and the decision may be sustained because of the rule that voluntary drunkenness, even from intoxicating liquors, may be shown to negative the existence of a necessary specific intent. § 107. The court, however, clearly held, contrary to reason, it seems, that temporary insanity from the voluntary use of cocaine and morphine is not subject to the same rules as temporary insanity from the voluntary use of intoxicating liquors.

[291] Ante, § 93 et seq.

sanity itself, and not upon the subsequent drunkenness."[202]

104. Involuntary Drunkenness.

The rule that drunkenness is no defense does not apply in the case of involuntary drunkenness, as where a man is intoxicated

---

[202] State v. Kraemer, 49 La. Ann. 766, 774; Choice v. State, 31 Ga. 424, 472, Beale's Cas. 269; Terrill v. State, 74 Wis. 278; People v. Cummins, 47 Mich. 334. And see Edwards v. State, 38 Tex. Cr. R. 386.

In a late Louisiana case it was held that, when a charge of murder is defended on the ground that the accused was laboring under delirium tremens at the time of the commitment of the act, and that he was therefore unable to know, realize, or appreciate what he was doing, the delirium tremens must be shown to have antedated the fit of drunkenness during which the act was committed. The court said: "In other words, if a person, being in possession of his mental faculties, voluntarily gets into a fit of drunkenness, and during such drunkenness commits a homicide under a diseased mental condition, occasioned by the same, he cannot set up such diseased mental condition as an excuse for his act; that, in order that a man should stand excused for a homicide committed during drunkenness, and while in a diseased mental condition, the diseased mental condition which excuses the homicide should be able to be successfully urged as an excuse for the act of getting drunk." State v. Kraemer, 49 La. Ann. 766.

by liquor which he has been compelled to drink against his will, or which has been prescribed by a physician.[293]. Drunkenness is not to be regarded as involuntary, within this exception, however, merely because it is the result of an inordinate and irresistible appetite for drink, overcoming the will and amounting to a disease.[294] Nor, it seems, is there any exemption from responsibility merely because a man, by reason of previous injury to his head or brain, or other constitutional infirmity, is more liable to be maddened by liquor than another man.[295]

105. Settled Insanity or Delirium Tremens.

The general rule that voluntary drunkenness is no defense does not apply in the case

---

[293] 1 Hale, P. C. 32; Pearson's Case, 2 Lewin, C. C. 144, Beale's Cas. 261. And see People v. Robinson, 2 Park. Cr. R. (N. Y.) 235.

[294] Flanigan v. People, 86 N. Y. 554, 40 Am. Rep. 556; Choice v. State, 31 Ga. 424, 472, Beale's Cas. 269.

[295] Choice v. State, supra.

It is said by Wharton that drunkenness is not to be regarded as voluntary when it is the result of moderate and customary indulgence, and is caused by some temporary disease or debility, or unsuspected susceptibility. 1 Whart. Crim. Law (10th Ed.) § 55, citing Roberts v. People, 19 Mich.

of settled insanity, or *delirium tremens,* resulting from previous habits of intemperance, for such a condition is the remote, and not the immediate, cause of the voluntary drinking, and the law does ordinarily regard remote causes.[296] Such insanity will exempt one from responsibility under the same circumstances, but only under the same circumstances, that insanity from any other cause would exempt him.[297]

106. Drunkenness may Negative Commission of the Act.

The fact that the accused was drunk at or about the time the deed with which he is

---

401, and Rogers v. State, 33 Ind. 543. See McCook v. State, 91 Ga. 740.

[296] Per Mr. Justice Story in U. S. v. Drew, 5 Mason, 28, Fed. Cas. No. 14,993.

[297] 1 Hale, P. C. 32; Reg. v. Davis, 14 Cox, C. C. 563, Beale's Cas. 262; U. S. v. Drew, 5 Mason, 28, Fed. Cas. No. 14,993; People v. Rogers, 18 N. Y. 9, 72 Am. Dec. 484, Beale's Cas. 264; and see U. S. v. McGlue, 1 Curt. 1, Fed. Cas. No. 15,679; Beasley v. State, 50 Ala. 149, 2 Am. Rep. 292; Upstone v. People, 109 Ill. 169; Wagner v. State, 116 Ind. 181; Erwin v. State, 10 Tex. App. 700; Carter v. State, 12 Tex. 500, 62 Am. Dec. 539; Evers v. State, 31 Tex. Cr. R. 318, 37 Am. St. Rep. 811; People v. Robinson, 2 Park Cr. R. (N. Y.) 235; Boswell v. Com., 20 Grat. (Va.) 860; State v. Robinson, 20 W. Va.

charged was committed may always be proven if it tends to show that he could not have committed the deed, the evidence being admitted in such case, not to exempt him from responsibility for an act done by him, but to show that some other person, and not he, must have committed it.[298]

107. Drunkenness may Negative Specific Intent or Knowledge.

(*a*) *Specific Intent.* — Proof of drunkenness, though voluntary, is also admissible, and may constitute a defense, when the accused is charged with an offense of which some specific intent is an essential element. As the offense cannot be committed without such an intent, if the fact of drunkenness negatives its existence, as where it appears that the accused was so drunk that he could not have entertained such an intent, it necessarily

713, 43 Am. Rep. 799; State v. Hand, 2 Hard. (Del.) 149, 1 Marv. 545.

[298] Thus, drunkenness may be shown when it tends to prove an alibi, as where it is shown that the accused, shortly before the time the act was done, was at another place, and in such a state of drunkenness that he could not have been at the place where the act was done. Ingalls v. State, 48 Wis. 647.

constitutes a complete defense.[299] There is some conflict in the decisions, but by the weight of authority this principle admits proof of drunkenness in prosecutions for assault with intent to kill, to wound, to rape, or to rob, in which it is necessary to prove the specific intent to kill, to wound, to rape, or to rob;[300] and in prosecutions for burglary, wherein a specific intent to commit a felony must be shown;[301] for larceny or robbery, wherein an intent to steal,—*the ani-*

---

[299] Step. Dig. Crim. Law, Art. 29; Reg. v. Doody, 6 Cox, C. C. 463, Beale's Cas. 261; People v. Walker, 38 Mich. 156, Beale's Cas. 271; Roberts v. People, 19 Mich. 401, 416; Loza v. State, 1 Tex. App. 488, 28 Am. Rep. 416; Cline v. State, 43 Ohio St. 332; State v. Garvey, 11 Minn. 154; People v. Ferris, 55 Cal. 588; Garner v. State, 28 Fla. 113, 29 Am. St. Rep. 232; Chrisman v. State, 54 Ark. 283, 26 Am. St. Rep. 44; People v. Robinson, 2 Park. Cr. R. (N. Y.) 235.

[300] Roberts v. People, 19 Mich. 401, 416; Crosby v. People, 137 Ill. 325; Cline v. State, 43 Ohio St. 332; State v. Garvey, 11 Minn. 154; Reagan v. State, 28 Tex. App. 227, 19 Am. St. Rep. 833; Whitten v. State, 115 Ala. 72; Chrisman v. State, 54 Ark. 283, 26 Am. St. Rep. 44.

[301] State v. Bell, 29 Iowa, 316; Schwabacher v. People, 165 Ill. 618. Contra, State v. Shores, 31 W. Va. 491, 13 Am. St. Rep. 875, 886.

mus furandi,—must be shown;[302] for an attempt to commit a crime, wherein it must be shown that there was the specific intent to commit the particular crime charged to have been attempted;[303] for perjury;[304] for bribery;[305] or for forgery.[306]

(*b*) *Knowledge.*—On the same principle, proof of voluntary drunkenness may be shown to negative the existence of a knowledge of particular facts, when such knowledge is an essential element of the offense charged, as in prosecutions for passing counterfeit money or uttering a forged instrument, in which it

[302] People v. Walker, 38 Mich. 156, Beale's Cas. 271; Wood v. State, 34 Ark. 341, 36 Am. Rep. 13; State v. Schingen, 20 Wis. 74, 78; Loza v. State, 1 Tex. App. 488, 28 Am. Rep. 416; Bartholomew v. People, 104 Ill. 601. Contra, Dawson v. State, 16 Ind. 428, 79 Am. Dec. 439.

[303] Reg. v .Doody, 6 Cox, C. C. 463, Beale's Cas. 261 (where the charge was attempt to commit suicide); Reagan v. State, 28 Tex. App. 227, 19 Am. St. Rep. 833 (where the charge was attempt to rape).

[304] Lytle v. State, 31, Ohio St. 196; Lyle v. State, 31 Tex. Cr. R. 103. Compare People v. Willey, 2 Park. Cr. R. (N. Y.) 19 and Schaller v. State, 14 Mo. 502.

[305] White v. State, 103 Ala. 72.

[306] People v. Blake, 65 Cal. 275.

is necessary to allege and prove that the accused knew that the money was counterfeit or the instrument forged.[307] The same would seem to be true of a prosecution for illegally voting at an election.[308]

(*c*) *Degree of Drunkenness.*—Voluntary drunkenness is no defense, even when a specific intent or a guilty knowledge is an essential element of the crime charged, unless the accused was so drunk as to be mentally incapable of entertaining the requisite intent, or of possessing the requisite knowledge. It is only material when it negatives the existence of such intent or knowledge.[309]

---

[307] Pigman v. State, 14 Ohio, 555, 45 Am. Dec. 558; U. S. v. Roudenbush, Baldw. 514, Fed. Cas. No. 16,198.

[308] People v. Harris, 29 Cal. 678. But see State v. Welch, 21 Minn. 22, where it was held that drunkenness could not be shown on a prosecution for illegally voting twice at an election. See, to the same effect, McCook v. State, 91 Ga. 740.

[309] U. S. v. Roudenbush, Baldw. 514, Fed. Cas. No. 16,198. In this case it was said by Judge Baldwin: "If the mind still acts,—if its reasoning and discriminating faculty remains,—a state of partial intoxication affords no ground of a favorable presumption in favor of an honest or innocent intention, in cases where a dishonest and criminal intention would be fairly inferred from the com-

108. Homicide Cases.

(*a*) *Murder at Common Law.*—The application of the principles stated above to homicide cases is of so much importance as to require special mention. As will be shown in a subsequent chapter, to constitute murder at common law it is not necessary that there shall be a specific intent to kill, but it is sufficient to show malice generally, or implied malice, as by showing the deliberate use of a deadly weapon without justification or excuse.[310] It is well settled, therefore, that, on a prosecution for murder at common law, voluntary drunkenness, however excessive, is no defense. It neither excuses nor mitigates the offense.[311]

---

mission of the same act when sober. The simple question is, did he know what he was about?" See, also Reagan v. State, 28 Tex. App. 227, 19 Am. St. Rep. 833; Warner v. State, 56 N. J. Law, 686, 44 Am. St. Rep. 415.

[310] Post, § 244.

[311] U. S. v. McGlue, 1 Curt. 1, Fed. Cas. No. 15,679; People v. Rogers, 18 N. Y. 9, 72 Am. Dec. 484, Beale's Cas. 264; Flanigan v. People, 86 N. Y. 554, 40 Am. Rep. 556; Choice v. State, 31 Ga. 424, 472, Beale's Cas. 269; State v. John, 8 Ired. (N. C.) 330, 49 Am. Dec. 396; People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162; State v. Kraemer, 49 La. Ann. 766; Willis v. Com., 32 Grat. (Va.) 929; State v.

(*b*) *Statutory Degrees of Murder* (*1*) *First Degree.*—In many states, however, murder is by statute divided into degrees, and an actual intent to kill, or some deliberation and premeditation, is made necessary to constitute murder in the first degree, but not to constitute murder in the second degree.[312] In these jurisdictions, by the decided weight of authority, drunkenness may be shown to negative the existence of such a state of mind, and so to show that a homicide was not murder in the first degree.[313] The fact of drunk-

Robinson, 20 W. Va. 713, 43 Am. Rep. 799; Shannahan v. Com., 8 Bush (Ky.) 463, 8 Am. Rep. 465; Beasley v. State, 50 Ala. 149, 20 Am. Rep. 292; State v. Bundy, 24 S. C. 439, 58 Am. Rep. 262; State v. Tatro, 50 Vt. 483; Carter v. State, 12 Tex. 500, 62 Am. Dec. 539; Upstone v. People, 109 Ill. 169.

The case of Golliher v. Com., 2 Duv. (Ky.) 163, 87 Am. Dec. 493, seems to be opposed to this well-settled doctrine.

[312] Post, § 251, et seq.

[313] In some states, this doctrine is not recognized. People v. Rogers, 18 N. Y. 9, 72 Am. Dec. 484, Beale's Cas. 264; Flanigan v. People, 86 N. Y. 554, 40 Am. Rep. 556; State v. Tatro, 50 Vt. 483.

The doctrine however, is a sound one, and has been recognized by the supreme court of the United States, and by most of the state courts. Hopt v. People, 104 U. S. 631; Boswell v. Com., 20 Grat.

enness will not mitigate the offense, if it was in fact committed willfully, deliberately, and premeditatedly, but it may be proved, and is entitled to weight in so far only as it tends to show that the accused was not in such a state of mind as to be capable of acting with that deliberation and premeditation that is required by the statutes to constitute murder in the first degree.[314]

(*2*) *Second Degree.*—Neither an actual

(Va.) 860; Willis v. Com., 32 Grat. (Va.) 929; Garner v. State, 28 Fla. 113, 29 Am. St. Rep. 232; Com. v. Dorsey, 103 Mass. 412; Shannahan v. Com., 8 Bush (Ky.) 463, 8 Am. Rep. 465; Pirtle v. State, 9 Humph. (Tenn.) 663; Lancaster v. State, 2 Lea (Tenn.) 575; Jones v. Com., 75 Pa. St. 403; Keenan v. Com., 44 Pa. St. 55, 84 Am. Dec. 414; State v. Robinson, 20 W. Va. 713, 43 Am. Rep. 799; People v. Belencia, 21 Cal. 544; People v. Williams, 43 Cal. 344; State v. Johnson, 40 Conn. 136, Beale's Cas. 270; State v. Johnson, 40 Conn. 136, 41 Conn. 584; State v. Trivas, 32 La. Ann. 1086, 36 Am. Rep. 293; Schlenker v. State, 9 Neb. 241; Wilson v. State, 60 N. J. Law, 171; State v. Faino, 2 Hard. (Del.) 153, 1 Marv. 492; Evers v. State, 31 Tex. Cr. R. 318, 37 Am. St. Rep. 811.

[314] Garner v. State, 28 Fla. 113, 29 Am. St. Rep. 232; Shannahan v. Com., 8 Bush (Ky.) 463, 8 Am. Rep. 465; Warner v. State, 56 N. J. Law, 686, 44 Am. St. Rep. 415; and other cases cited in the note preceding.

intent to kill nor premeditation is necessary under the statutes to constitute murder in the second degree, but general or implied malice is sufficient, as in the case of murder at common law.[315] Drunkenness, therefore, is no defense on a charge of this degree of murder.[316]

(*3*) *Intent Conceived Before Becoming Drunk.*—Even in a prosecution for murder in the first degree, the fact that the accused was drunk when he committed the deed is immaterial, if he had determined to commit it before becoming drunk.[317]

(*c*) *Manslaughter.*—The extent to which drunkenness may be shown at common law to

---

[315] Post, § 254.

[316] Boswell v. Com., 20 Grat. (Va.) 860; State v. Robinson, 20 W. Va. 713, 43 Am. Rep. 799; Jones v. Com., 75 Pa. St. 403; Wilson v. State, 60 N. J. Law, 171; Evers v. State, 31 Tex. Cr. R. 318, 37 Am. St. Rep. 811.

[317] If a man, while sober, deliberately resolves to kill another, and then drinks for the purpose of nerving himself to the commission of the deed, and kills the other when he is so drunk as to be incapable of forming such a design, and temporarily unconscious of what he is doing, he is still guilty of murder in the first degree. State v. Robinson, 20 W. Va. 713, 43 Am. Rep. 799; Garner v. State, 28 Fla. 113, 29 Am. St. Rep. 232.

reduce a homicide from murder to voluntary manslaughter is not altogether clear.[318] The weight of authority is in favor of the rule that, if the homicide was committed after such provocation as the law deems adequate to reduce a killing under the influence of passion and heat of blood caused thereby to manslaughter, evidence that the accused was drunk at the time of the homicide may be admitted and considered in determining whether the killing was in the heat of blood caused by the provocation, or whether it was with malice.[319] But it must be regarded as settled that the mere fact of drunkenness will not reduce to manslaughter a homicide committed on inadequate provocation, or on adequate provocation after the lapse of a reasonable time for the blood to cool. In other words, if the provocation would not reduce a homicide by a sober man from murder to

---

[318] As to what constitutes voluntary manslaughter, see post, § 255, et seq.

[319] Rex v. Thomas, 7 Car. & P. 817; People v. Rogers, 18 N. Y. 9, 72 Am. Dec. 484, Beale's Cas. 264. See, also, McIntyre v. People, 38 Ill. 514; Rafferty v. People, 66 Ill. 118; Malone v. State, 49 Ga. 210; Shannahan v. Com., 8 Bush (Ky.) 463, 8 Am. Rep. 465. And see Pearson's Case, 2 Lewin, C. C. 144, Beale's Cas. 261.

manslaughter, it will not so reduce a homicide by a drunken man.[320]

IX. RESPONSIBILITY OF CORPORATIONS.

109. In General.—A corporation is liable to indictment:

1. **For nonfeasance.**
2. **By the weight of authority, for misfeasance, if the offense does not involve the element of personal violence or the element of malice or actual criminal intent.**
3. **But it seems that it is not indictable for an offense of which malice or an actual criminal intent is an essential element.**
4. **It is not indictable for felony.**

110. Nonfeasance.

In view of the fact that a corporation is, in

---

[320] Rex v. Carroll, 7 Car. & P. 145; People v. Rogers, 18 N. Y. 9, 72 Am. Dec. 484, Beale's Cas. 264; Shannahan v. Com., 8 Bush (Ky.) 463, 8 Am. Rep. 465; Com. v. Hawkins, 3 Gray (Mass.) 463; Keenan v. Com., 44 Pa. St. 55, 84 Am. Dec. 414; Garner v. State, 28 Fla. 113, 29 Am. St. Rep. 232; McIntyre v. People, 38 Ill. 514; Rafferty v. People, 66 Ill. 118; State v. Tatro, 50 Vt. 483.

In Shannahan v. Com., supra, it was said: "The proper rule is that one in a state of voluntary intoxication is subject to the same rule of conduct, and to the same rules and principles of law, that a sober man is; and that, where a provocation is offered, and the one offering it is killed, if it mitigates the offense of the man drunk, it should also mitigate the offense of the man sober."

the language of Chief Justice Marshall, "an artificial being, invisible, intangible, and existing only in contemplation of law," it was at one tme doubted whether a corporation could be guilty of any crime. Lord Holt is reported as having said that " a corporation is not indictable, but the particular members of it are."[321] This, however, is not now the law. A corporation cannot be imprisoned, but it may be deprived of its charter, or it may be fined; and it is now well settled that it may be indicted and fined for offenses consisting in mere nonfeasance, as for failure to repair a public road or a bridge, or to perform other duties imposed upon it by law.[322]

---

[321] Anon., 21 Mod. 559.

[322] Reg. v. Birmingham & G. R. Co., 3 Q. B. 223, 9 Car. & P. 469; Louisville, etc., R. Co. v. Com., 13 Bush (Ky.) 388, 26 Am. Rep. 205; State v. City of Portland, 74 Me. 268, 43 Am. Rep. 586; State v. Godwinsville, etc., Road Co., 49 N. J. Law, 266, 60 Am. Rep. 611; Susquehanna & B. Turnpike Road Co. v. People, 15 Wend. (N. Y.) 267; People v. Albany Corp., 11 Wend. (N. Y.) 539, 27 Am. Dec. 95; Delaware Division Canal Co. v. Com., 60 Pa. St. 367, 100 Am. Dec. 570; Louisville, etc., R. Co. v. State, 3 Head (Tenn.) 523, 75 Am. Dec. 778. State v. Monongahela River R. Co., 37 W. Va. 108; Com. v. Central

111. Misfeasance.

In several of the earlier cases a distinction was made, with respect to the criminal responsibility of corporations, between nonfeasance and misfeasance, and, while it was conceded

---

Bridge Corp., 12 Cush. (Mass.) 242. And see 7 Am. & Eng. Enc. Law (2d. Ed.) 841, 842.

It was said by Bigelow, J., in Com. v. Proprietors of New Bedford Bridge, 2 Gray (Mass.) 339, Beale's Cas. 277: "Corporations cannot be indicted for offenses which derive their criminality from evil intention, or which consist in a violation of those social duties which appertain to men and subjects. They cannot be guilty of treason or felony, of perjury, or offenses against the person. But beyond this there is no good reason for their exemption from the consequences of unlawful and wrongful acts committed by their agents in pursuance of authority derived from them. Such a rule would, in many cases, preclude all adequate remedy, and render reparation for an injury committed by a corporation impossible, because it would leave the only means of redress to be sought against irresponsible servants, instead of against those who truly committed the wrongful act by commanding it to be done. There is no principle of law which would thus furnish immunity to a corporation. If they commit a trespass on private property, or obstruct a way, to the special injury and damage of an individual, no one can doubt their liability therefor. In like manner, and for the same reason, if they do similar acts,

that an indictment would lie for nonfeasance, it was held that it would not lie for misfeasance, as for a nuisance in erecting a dam across a navigable river,[323] or in obstructing

---

to the inconvenience and annoyance of the public, they are responsible in the form and mode appropriate to the prosecution and punishment of such offenses."

Thus, in Susquehanna & B. Turnpike Road Co. v. People, 15 Wend. (N. Y.) 267, it was held that a turnpike-road company was liable to indictment at common law for suffering its road to be out of repair.

And in Com. v. Central Bridge Corp., 12 Cush. (Mass.) 242, it was held that a provision in the charter of a toll-bridge corporation, that the bridge should "at all times be kept in good, safe, and passable repair," required the company to light the bridge, if necessary to make it safe and convenient for passage at night, and that an indictment would lie for failure to do so.

And in Louisville, etc., R. Co. v. Com., 13 Bush (Ky.) 388, 26 Am. Rep. 205, it was held that it was the duty of a railroad company to cause signals to be given, where the safety of travelers on intersecting roads demanded that a warning should be given of approaching trains, and that an habitual failure to give such signals or warnings was an indictable nuisance.

[323] State v. Great Works Milling, etc., Co., 20 Me. 41, 37 Am. Dec. 38. Contra, State v. City of Portland, 74 Me. 268, 43 Am. Rep. 586.

a highway by digging it up and placing stones and dirt therein.[324] This view, however, has been almost universally repudiated, and it may now be regarded as settled that a corporation may be indicted for misfeasance as well as for nonfeasance.[325] Thus, indictments have been sustained against railroad companies and other corporations for obstructing a highway by positive acts, as by cutting through the same,[326] or by building station houses, depots, or other structures thereon.[327] Indictments have also been sustained against corporations for creating a nuisance by build-

[324] Com. v. Swift Run Gap Turnpike Co., 2 Va. Cas. 362.

[325] Reg. v. Great North of England R. Co., 9 Q. B. 315; Com. v. Proprietors of New Bedford Bridge, 2 Gray (Mass.) 339, Beale's Cas. 277; Palatka, etc., R. Co. v. State, 23 Fla. 546, 11 Am. St. Rep. 395; Delaware Division Canal Co. v. Com., 60 Pa. St. 367, 100 Am. Dec. 570; State v. City of Portland, 74 Me. 268, 43 Am. Rep. 586; State v. Atchison, 3 Lea (Tenn.) 729, 31 Am. Rep. 663; State v. Baltimore & O. R. Co., 15 W. Va. 362, 26 Am. Rep. 803.

[326] Reg. v. Great North of England R. Co., 9 Q. B. 315.

[327] State v. Morris & E. R. Co., 23 N. J. Law, 360; State v. Vermont Cent. R. Co., 27 Vt. 103.

ing a bridge across a navigable river,[328] and by polluting a water course,[329] for keeping a disorderly house,[330] for permitting gaming on its premises,[331] for taking usury,[332] for violation of the Sunday laws,[333] and for cutting down timber and obstructing a river, in violation of a statute.[334]

112. Offenses Involving Personal Violence or Evil Intent.

It has been said that a corporation cannot be indicted for an offense involving the ele-

---

[328] Com. v. Proprietors of New Bedford Bridge, 2 Gray (Mass.) 339, Beale's Cas. 277.

[329] In Rex v. Medley, 6 Car. & P. 292, an indictment was sustained against a gas company for nuisance in so conducting its works as to convey large quantities of noisome liquids, arising from the manufacture of gas, into the river Thames, whereby the water was polluted, and fish destroyed. See, also, State v. City of Portland, 74 Me. 268, 43 Am. Rep. 586.

[330] State v. Passaic County Agricultural Soc., 54 N. J. Law, 260.

[331] Com. v. Pulaski County A. & M. Ass'n, 92 Ky. 197.

[332] State v. Security Bank of Clark, 2 S. D. 538.

[333] State v. Baltimore & O. R. Co., 15 W. Va. 362, 36 Am. Rep. 803.

[334] State v. White Oak River Corp., 111 N. C. 661.

ment of personal violence, as assault and battery, or for an offense involving the element of malice or evil intent.[335] And perhaps this must now be regarded as the law. It is well settled, however, that a corporation may be be made liable in a civil action for an assault and battery committed by an agent in the course of his employment, and for malicious wrongs of its agents, and some of the courts have shown a tendency to extend this doctrine to criminal prosecutions. Malice is an element of criminal libel, and an indictment for libel has been sustained against a corporation.[336] Wharton says that there is no reason why the same acts for which a corporation is subject to a civil action may not equally be the basis of a criminal proceeding, when they result in injury to the public at large;[337] and he is sustained by *dicta* in some of the late cases.[338] There are some crimes of

[335] Com. v. Proprietors of New Bedford Bridge, 2 Gray (Mass.) 339, Beale's Cas. 277; Reg. v. Birmingham & G. R. Co., 3 Q. B. 223, 9 Car. & P. 469; Delaware Division Canal Co., v. Com., 60 Pa. St. 367, 100 Am. Dec. 570.

[336] State v. Atchison, 3 Lea (Tenn.) 729, 31 Am. Rep. 663.

[337] 1 Whart. Crim. Law, § 87.

[338] See Com. v. Pulaski County A. & M. Ass'n,

which, from their very nature, corporations cannot be guilty, as perjury.[339] And they cannot be indicted for a felony, because, if for no other reason, they cannot be subjected to the punishment prescribed for felony.[340]

113. Municipal Corporations.

The doctrine that corporations may be liable to indictment applies, not only to private corporations, but to municipal corporations as well. Thus, it has been held that a municipal corporation may be indicted for nuisance where it so constructs its public sewers that the outfalls thereof create a public nuisance, noisome and prejudicial to the public health, and fails to promptly remove the accumulations of filth.[341]

---

92 Ky. 200; State v. Passaic County Agricultural Soc., 54 N. J. Law, 260; State v. Baltimore & O. R. Co., 15 W. Va. 362, 36 Am. Rep. 803.

[339] Com. v. Pulaski County A. & M. Ass'n, supra.

[340] Com. v. Pulaski County A. & M. Ass'n, supra. And see Com. v. Proprietors of New Bedford Bridge, 2 Gray (Mass.) 339. Beale's Cas. 277.

[341] State v. City of Portland, 74 Me. 268, 43 Am. Rep. 586.

In People v. Albany Corp., 11 Wend. (N. Y.) 539, it was held that where the corporation of a

X. CONCURRENCE OF ACT AND INTENT.

114. In General.—When a particular intent is essential to constitute a crime, the act and the intent must concur in point of time.

For example, to constitute larceny it is essential that there shall be a trespass in taking the property, and that the property shall be taken with felonious intent. The offense is not committed unless these two elements concur in point of time. If a man obtains possession of another's goods by delivery by the other, and without any fraudulent intent at the time, he does not commit a trespass, and he cannot commit a trespass so long as he has lawful possession. If, therefore, while thus in possession, he conceives a felonious intent, and appropriates the goods to his own use, he does not commit larceny.[342] And so it is in the case of burglary, which is the breaking

---

city had power to direct the excavating, deepening, and cleansing of a basin connected with a river, and neglected to take the necessary measures in that respect after the basin had become foul by the aggregation of mud and other substances, so that the water was corrupted, and the air infected by noisome and unwholesome stenches, and a nuisance was thus created, an indictment would lie against it.

[342] Post, § 316.

and entering of the dwelling house of another in the night time with intent to commit a felony. This intent must exist at the time of the breaking and entry. It is not burglary to break and enter a dwelling house without any felonious intent, and afterwards form and carry out such an intent.[343]

115. Ratification of Another's Act.

If an unlawful act is done by a person's agent or servant without his authority, subsequent ratification of the act will not render him responsible.[344]

---

[343] State v. Moore, 12 N. H. 42, Beale's Cas. 224; post, § 407.

[344] Morse v. State, 6 Conn. 9, Beale's Cas. 223; post, § 194(1).

CHAPTER IV.

I. NECESSITY FOR A CRIMINAL ACT, §§ 116–118.
II. ATTEMPT to COMMIT CRIME §§ 119–129.
III. SOLICITATION TO COMMIT CRIME, §§ 130–133.
IV. CRIMINAL CONSPIRACY, §§ 134–149.
V. CONSENT AS BETWEEN INDIVIDUALS §§ 150–154.
VI. RECOVERY IN CIVIL ACTION, § 155.
VII. SETTLEMENT AND CONDONATION, § 156.
VIII. WRONG OF PERSON INJURED, § 157.
IX. CONTRIBUTORY NEGLIGENCE OF PERSON INJURED, § 159.
X. CONTRIBUTING ACTS OR NEGLIGENCE OF THIRD PERSONS, § 159.
XI. ENTRAPMENT, §§ 160–162.

I. NECESSITY FOR A CRIMINAL ACT.

116. In General.—To constitute a crime there must be a criminal act, as well as a criminal intent. The law does not punish a mere intent to commit a crime. There is a sufficient act, however,

1. Where a person attempts to commit a crime, though he may not succeed in accomplishing his purpose.
2. Where a person solicits another to commit a felony, or in some jurisdictions a misdemeanor, though the other may not do so.
3. Where two or more agree or conspire to commit a crime or do any other unlawful

act, though no attempt may be made to carry out the conspiracy.

117. Mere Intention to Commit a Crime.

The general rule that the state does not take cognizance of or undertake to punish a criminal intent, unless it is accompanied by a criminal act, has repeatedly been laid down in text-books and in the cases. "It is certain that a bare intention is not punishable;" but "when joined with acts whose circumstances may be tried, it is so."[1] The authorities, however, while agreeing on the general principle, have not always agreed as to what constitutes a sufficient act to render one amenable to the criminal law.

---

[1] Per Lee, J., in Rex v. Sutton, Cas. temp. Hardw. 370, 1 East, P. C. 172, 2 Strange, 1074, Beale's Cas. 125. And see Rex v. Heath, Russ. & R. 184; Respublica v. Malin, 1 Dall. (Pa.) 33; State v. Asher, 50 Ark. 427, Beale's Cas. 229; U. S. v. Riddle, 5 Cranch (U. S.) 311, Beale's Cas. 222; Smith v. Com., 54 Pa. St. 209, 93 Am. Dec. 686; Miles v. State, 58 Ala. 390; Cunningham v. State, 49 Miss. 685.

A bystander's mere mental approval of a crime committed by another in his presence does not make him guilty as a principal in the second degree, or render him otherwise liable to punishment. State v. Cox, 65 Mo. 29. See post, § 174.

Having Possession of Articles with Criminal Intent.—According to the better opinion, a man is not punishable at common law for merely having possession of articles with intent to commit a crime, as of burglars' tools with intent to commit burglary, stamps or dies with intent to counterfeit coin, counterfeit money or obscene publications with intent to utter or publish the same, etc.[2]

[2] In Rex v. Heath, Russ. & R. 184, it was held that having counterfeit silver in one's possession, with intent to utter the same as good, was not indictable prior to the statute of 2 & 3 Wm. IV., c. 34, § 8, making it so. See, to the same effect, Rex v. Stewart, Russ. & R. 288. In Dugdale v. Reg., 1 El. & Bl. 435, Dears. C. C. 64, Beale's Cas. 221, it was held that having possession of indecent prints, with intent to publish them, was not indictable. See, also, Com. v. Morse, 2 Mass. 138 (possession of forged bills, with intent to pass them), and Rex v. Rosenstein, 2 Car. & P. 414 (possession of an obscene libel with intent to publish it).

There are some decisions to the contrary. Thus, in Rex v. Sutton, Cas. temp. Hardw. 370, 1 East, P. C. 172, 2 Strange, 1074, Beale's Cas. 125, it was held that it was a misdemeanor at common law for a person to have tools for coining in his possession, with intent to use them. And in Rex v. Parker, 1 Leach, C. C. 41, it was held that having possession of counterfeit money,

Procuring with Criminal Intent.—It has been held, however, that the procuring of tools, etc., with intent to use them in counterfeiting, or the procuring of counterfeit coin, with intent to utter it as good, or of indecent prints with intent to publish them, is a sufficient act to render one indictable at common law.[3] The act of procuring is not punished as an attempt to commit a crime, for it does not go far enough to constitute an attempt.[4]

Statutes.—It is, of course, within the

---

with intent to pass it as good, was indictable at common law.

[3] In Rex v. Fuller, Russ. & R. 308, it was held that procuring base coin, with intent to utter it as good, was a misdemeanor; and also that having possession of a large quantity of base coin was prima facie evidence of having procured it with intent to utter it.

In Dugdale v. Reg., 1 El. & Bl. 435, Dears. C. C. 64, Beale's Cas. 221, this case was followed, and it was held a misdemeanor to procure indecent prints with intent to publish them.

In Reg. v. Roberts, Dears. C. C. 539, 7 Cox. C. C. 39, the doctrine was again applied, and it was held a misdemeanor to procure stamps or dies with intent to use them in counterfeiting coin.

[4] Reg. v. Roberts, Dears. C. C. 539, 7 Cox, C. C. 39. See Post, § 123.

power of the legislature to punish the mere having possession of articles with intent to use them in the commission of crimes. Both in England and in this country statutes have been enacted punishing the bare possession, with criminal intent, of implements for coining,[5] counterfeit money,[6] burglars' tools,[7] etc.

118. Act Intended as, but not Constituting, a Crime.

Since the law does not punish a mere criminal intent unaccompanied by a criminal act, a person who intends a particular crime, and thinks he is committing it, is not for that reason guilty, if his acts do not in fact amount to a crime.

Such a case arose during the Revolutionary War. An American, mistaking a corps of American troops for British, went over to them. It was held that the fact that he thought they were British did not make him guilty of treason.[8] The same principle ap-

[5] See Rex v. Foster, 7 Car. & P. 495; Reg. v. McMillan, 1 Cox, C. C. 41.

[6] See Reg. v. Williams, Car. & M. 259.

[7] See Reg. v. Oldham, 2 Den. C. C. 472, 3 Car. & K. 249, 5 Cox, C. C. 551; Reg. v. Bailey, Dears. C. C. 244, 6 Cox, C. C. 241.

[8] Respublica v. Malin, 1 Dall. (Pa.) 33, Beale's Cas. 127.

plies where a person obtains another's goods or money by making representations which he supposes to be false, but which happen to be true.[9] And it would apply to a man forcibly having intercourse with his wife against her will, mistaking her for some other woman.[10] Whether there may be a conviction for an attempt in such case is elsewhere considered.[11]

II. ATTEMPT TO COMMIT A CRIME.

119. In General.—As a general rule, any attempt to commit a crime is a misdemeanor at common law, whether the crime attempted be a felony or merely a misdemeanor, and whether it be a common-law or a statutory offense. But it has been held that the rule does not apply to statutory misdemeanors which are merely mala prohibita.

---

[9] State v. Asher, 50 Ark. 427, Beale's Cas. 229; State v. Garris, 98 N. C. 733; People v. Reynolds, 71 Mich. 343; post, § 362.

The same is true where a person attempts to obtain another's property by false pretenses, but, for some reason, no injury results. See post, § 368.

[10] Post, § 316.

[11] Post, § 129.

An act which is not an offense at the time it is committed cannot become such by any subsequent independent act of the party, with which it has no connection. U. S. v. Fox, 95 U. S. 670, Beale's Cas. 227.

To constitute an indictable attempt to commit a crime, there must be:

1. **An intent to commit that particular crime.**
2. **An act done in pursuance of such intent, which falls short of the actual commission of the crime. Neither the bare intent, without any act, nor mere preparation, is sufficient.**
3. **There must be at least apparent ability to commit the intended crime.**[12]

120. What Attempts are Indictable.

(*a*) *In General.*—It is settled beyond any question that it is an indictable misdemeanor at common law to attempt to commit any crime, except as hereafter explained, whether the crime intended is a felony, as murder, rape, robbery, etc., or merely a misdemeanor, as cheating, forgery, etc., and whether it is

[12] "An attempt, in criminal law, is an apparent unfinished crime, and hence is compounded of two elements, viz: (1) The intent to commit a crime, and (2) a direct act done towards its commission, but falling short of the execution of the ultimate design. It need not, therefore, be the last proximate act to the consummation of the crime in contemplation, but is sufficient if it be an act apparently adapted to produce the result intended. It must be something more than mere preparation." Per Lewis, P., in Glover v. Com., 86 Va. 382, Beale's Cas. 133, citing Uhl v.

a common-law or a statutory crime.[13] "If an offense is made a misdemeanor by statute," said Parke, B., "it is made so for all purposes. There are many cases in which an attempt to commit a misdemeanor has been held to be a misdemeanor; and an attempt to commit a misdemeanor is a misdemeanor, whether the offense is created by statute or was an offense at common law."[14]

(*b*) *Suicide.*—At common law, suicide was regarded as a crime, and was punished by forfeiture of goods and an ignominious

---

Com., 6 Grat. (Va.) 706; Hicks v. Com., 86 Va. 223, 19 Am. St. Rep. 891.

[13] 1 Whart. Crim. Law (10th Ed.) § 173 et seq.; 1 Hawk. P. C. c. 25, § 3; Rex v. Roderick, 7 Car. P. 795, Beale's Cas. 127; Smith v. Com., 54 Pa. St. 209, 93 Am. Dec. 686; Com. v. Barlow, 4 Mass. 439; State v. Boyden, 13 Ired. (N. C.) 505; State v. Jordan, 75 N. C. 27; Rafferty v. State, 91 Tenn. 655; Smith v. Com., 54 Pa. St. 209, 93 Am. Dec. 686; Hicks v. Com., 86 Va. 226, 19 Am. St. Rep. 891.

By statute in some states, an attempt to commit a felony is made a felony by being made punishable by imprisonment in the state prison. Rafferty v. State, 91 Tenn. 655; ante, § 3.

[14] Rex v. Roderick, 7 Car. & P. 795, Beale's Cas. 127.

burial;[15] and an attempt to commit suicide is a misdemeanor at common law.[16]

(*c*) *Misdemeanors Merely Mala Prohibita.*—It has been held that the rule that an attempt to commit a misdemeanor is a misdemeanor does not apply to statutory misdemeanors that are merely *mala prohibita,* as selling cotton in the seed between sunset and sunrise,[17] usury,[18] selling intoxicating liquors,[19] etc. But the extent of this exception is not clear.[20]

(*d*) *Attempt to Commit an Attempt.*—There can be no such thing as an attempt to

---

[15] Post, § 250.

[16] Reg. v. Doody, 6 Cox, C. C. 463, Beale's Cas. 261. See, also, Com. v. Dennis, 105 Mass. 162; Com. v. Mink, 123 Mass. 422, 25 Am. Rep. 109.

Suicide is not now punished at all, and in Massachusetts, where the statute punishes attempts to commit "indictable offenses," it has been held that an attempt to commit suicide is not indictable in that state. Com. v. Dennis, supra.

[17] Whitesides v. State, 11 Lea (Tenn.) 474. And see Taylor v. State, 11 Lea (Tenn.) 708.

[18] See Rex v. Upton, 2 Strange, 816.

[19] Pulse v. State, 5 Humph. (Tenn.) 108. See also, Com. v. Willard, 22 Pick. (Mass.) 476.

[20] See 3 Am. & Eng. Enc. Law (2d Ed.) 252.

attempt a crime.[21] Since a simple assault, as we shall see, is nothing more than an attempt to commit a battery, and aggravated assaults are nothing more than attempts to commit murder, rape, robbery, etc.,[22] there can be no such thing as an attempt to commit an assault, whether simple or aggravated.[23]

121. The Intent.

Obviously, there cannot be an attempt to commit a particular crime unless there is an intention to commit that crime. A general criminal intent is sometimes sufficient to render one guilty of a crime, but it is never sufficient to render him guilty of an attempt. The specific intent is absolutely essential.[24] For example, to constitute murder, an intent to kill need not be shown. It is murder to

---

[21] State v. Sales, 2 Nev. 268.

[22] Post, §§ 200, 208.

[23] Wilson v. State, 53 Ga. 205; People v. Thomas, 63 Cal. 482; White v. State, 22 Tex. 608.

[24] Rex v. Boyce, 1 Mood. C. C. 29, Beale's Cas. 182; Rex v. Davis, 1 Car. & P. 306; Reg. v. Cruse, 8 Car. & P. 541; Reg. v. Donovan, 4 Cox, C. C. 399; Hall v. Com., 78 Va. 678; Sharp v. State, 19 Ohio, 379; Cunningham v. State, 49 Miss. 685; Lewis v. State, 35 Ala. 380; Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1; Reagan v. State, 28 Tex. App. 227, 19 Am. St. Rep. 833.

kill a person while engaged in the commission of another felony, or in resisting a lawful arrest, or in doing a wanton act which has a natural tendency to cause death.[25] But to constitute an attempt to murder, the specific intent to kill is necessary.[26] And the same is true of an attempt to commit any other crime, as rape,[27] larceny,[28] robbery,[29] abortion,[30] mayhem,[31] etc.

---

[25] Post, § 248.

[26] Reg. v. Donovan, 4 Cox, C. C. 399; Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1; Maher v. People, 10 Mich. 212; Pruitt v. State, 20 Tex. App. 129; Slatterly v. People, 58 N. Y. 354; Morgan v. State, 33 Ala. 413; post, § 208.

[27] On a prosecution for attempt to rape, there must be a specific intent to have intercourse in such a way as will constitute rape,—by force and against the will of the woman. Lewis v. State, 35 Ala. 380; Carroll v. State, 24 Tex. App. 366; State v. Kendall, 73 Iowa, 255, 5 Am. St. Rep. 679; State v. Massey, 86 N. C. 658, 41 Am. Rep. 478; Charles v. State, 11 Ark. 389; post, § 208.

This does not apply where the girl is under the age of consent, so that want of consent is not necessary. Reg. v. Beale, L. R. 1 C. C. 10, 10 Cox, C. C. 157; State v. Pickett, 11 Nev. 255, 21 Am. Rep. 754; People v. McDonald, 9 Mich. 150.

[28] Hall v. Com., 78 Va. 678.

[29] Hanson v. State, 43 Ohio St. 376.

[30] State v. Moore, 25 Iowa, 128, 95 Am. Dec. 776.

[31] Rex v. Boyce, 1 Mood. C. C. 29, Beale's Cas.

Intent Inferred.—In a prosecution for an attempt, as in other cases where the intent is material, the intent need not be proved by positive or direct evidence. It may be inferred—as a matter of fact, however—from the conduct of the party and the other circumstances.[82]

122. The Act In General—Intention and Attempt Distinguished.

To constitute an attempt to commit a crime, there must be something more than a mere intention to commit it. There is a clear distinction between intention and attempt. The

---

182; Filkins v. People, 69 N. Y. 101, 25 Am. Rep. 143.

[82] Scott v. People, 141 Ill. 195 (intent to procure abortion, inferred from use of instruments without any other apparent reason); State v. Grossheim, 79 Iowa, 75 (intent to commit rape, inferrable from conduct); Com. v. Hersey, 2 Allen (Mass.) 173, Beale's Cas. 183 (intent to kill, inferrable from administering poison or use of deadly weapon under such circumstances as to evince such an intent). See, also, as to inference of intent to kill, Rex v. Howlett, 7 Car. & P. 274; Jeff v. State, 37 Miss. 321, 39 Miss. 593. And as to intent to rape, see Lewis v. State, 35 Ala. 380; Carter v. State, 35 Ga. 263; Hays v. People, 1 Hill (N. Y.) 351; State v. Smith, 80 Mo. 516.

former indicates the purpose existing in the mind, while the latter indicates some act done in pursuance of the intent. Without an overt act there cannot be an attempt.[33]

123. Preparation and Attempt Distinguished.

There is also a distinction, though it is not so very clearly defined, between preparation and attempt. For a man to make up his mind to commit a crime, and to make preparations to commit it, is not an attempt. He must go further than mere preparation, and do some act directly tending to a carrying out of his unlawful intent.[34] Procuring or loading a gun, or buying poison, or walking to a particular place, with intent to kill another, is not enough to make one guilty of an

---

[33] Reg. v. Roberts. Dears. C C. 539, 7 Cox, C. C. 39; U. S. v. Riddle, 5 Crauch (U. S.) 311, Beale's Cas. 311; People v. Murray, 14 Cal. 160; Stabler v. Com., 95 Pa. St. 318, 40 Am. Rep. 653; State v. Lung, 21 Nev. 209, 37 Am. St. Rep. 505; Com. v. Clark, 6 Grat. (Va.) 675; Cox v. People, 82 Ill. 191; Cunningham v. State, 49 Miss. 702. And see Lovett v. State, 19 Tex. 174.

[34] Reg. v. Roberts Dears. C. C. 539, 7 Cox, C. C. 39; Reg. v. Eagleton, Dears. C. C. 515; U. S. v. Stephens, 8 Sawy. 116, 12 Fed. 52, Beale's Cas. 130; State v. Lung, 21 Nev. 209, 37 Am. St. Rep. 505.

attempt to commit murder.[35] The same is true of a purchase of coal oil and matches with intent to commit arson,[36] or the procuring of metal and dies with intent to commit the offense of counterfeiting money.[37] And so it is in many other cases.[38] These acts

---

[35] Reg. v. Cheeseman, 9 Cox, C. C. 100, Leigh & C. 140; Reg. v. Williams, 1 Den. C. C. 39; Stabler v. Com., 95 Pa. St. 318, 40 Am. Rep. 653; Hicks v. Com., 86 Va. 223, 19 Am. St. Rep. 891.

[36] Per Pollock, C. B., in Reg. v. Taylor, 1 Fost. & F. 511. And see McDade v. People, 29 Mich. 50.

[37] Reg. v. Roberts, Dears. C. C. 539, 7 Cox, C. C. 39. Such an act is punishable, but not as an attempt. See ante, § 117.

[38] In U. S. v. Stephens, 8 Sawy. 116, 12 Fed. 52, Beale's Cas. 130, the defendant was charged with an attempt to introduce spirituous liquors into Alaska, in violation of an act of congress. The evidence showed that he sent from Alaska, where he resided, to a wholesale dealer in San Francisco, an order for 100 gallons of whisky, to be shipped to him in Alaska. It was held that he was not guilty of an attempt to introduce the whiskey into Alaska, as he had done no act to carry out his illegal intent of which the law could take cognizance, the offer to purchase the whiskey being an act preparatory and indifferent in its character.

In People v. Murray, 14 Cal. 160, the defendant was convicted of an attempt to contract an incestuous marriage. From the evidence it ap-

are mere preparations, indifferent in their character, and do not advance the conduct of the party far enough to constitute an attempt.[39] "Between preparations for the attempt and the attempt itself," it has been said, "there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement towards the commission after the preparations are made."[40] It is said by

---

peared that he intended to contract a marriage with his niece, that he eloped with her for that purpose, and that he requested a third person to get a magistrate to perform the ceremony. On appeal, the judgment was reversed on the ground that this was mere preparation.

In State v. Lung, 21 Nev. 209, 37 Am. St. Rep. 505, it was held that an attempt to administer cantharides to a woman, with intent to have intercourse with her by this means, was not an attempt to rape, even conceding that having intercourse by this means would constitute rape.

One who starts out with a loaded gun to hunt game in close season is not guilty of an attempt to kill game. His conduct does not go beyond mere preparation. Cromwell v. Fraternal Accident Ass'n., 6 N. D. 201.

[39] See the cases above cited.

[40] People v. Murray, 14 Cal. 160.

Wharton: "To make the act an indictable attempt, it must go so far that it would result in the crime unless frustrated by extraneous circumstances." [41]

124. Acts Going beyond Mere Preparation.

If a man goes further than mere preparation, and does an act that is not indifferent in itself, but tends directly towards the commission of the crime intended, and which will apparently result in its commission unless frustrated by extraneous circumstances, he is guilty of an attempt. The act done need not be the last proximate act towards the consummation of the intended crime.[42] Thus, one who mixes poison with food, and places it on a table with the intent that another shall take it, or who pours coal oil on a house with intent to commit arson, or who turns or seizes the knob of a door with intent to enter and steal, is in each case guilty of an attempt to commit the intended crime, though he is prevented from proceeding further or abandons his evil purpose.[43]

---

[41] 1 Whart. Crim. Law (10th Ed.) § 181.

[42] Reg. v. Cheeseman, 9 Cox, C. C. 100, Leigh & C. 140; Glover v. Com., 86 Va. 382, Beale's Cas. 133; Uhl v. Com., 6 Grat (Va.) 706; State v. Smith, 80 Mo. 516.

125. Mere Solicitation.

View That Solicitation is an Attempt.—There are some cases in which the mere solicitation of another to commit a crime has been held indictable as an attempt to commit the crime, on the theory that mere solicitation is sufficiently an act done—"a step in the direction of the crime"—to constitute an at-

---

[43] Reg. v. Bain, 9 Cox, C. C. 98; People v. Lawton, 56 Barb. (N. Y.) 126; Mullen v. State, 45 Ala. 43, 6 Am. Rep. 691.

In Reg. v. Cheeseman, 9 Cox, C. C. 100, Leigh & C. 140, the defendant had laid aside some of his employer's goods, with the intent to carry them off when he should have an opportunity, but was detected before he could do so. He was held guilty of an attempt to commit larceny.

In Reg. v. Eagleton, Dears. C. C. 515, the defendant was held guilty of an attempt to obtain money by false pretenses, where he had contracted to deliver goods, and had, by false pretenses, obtained credit for more than he had delivered, but was not paid because of discovery of the fraud.

In Rex v. Scofield, Cald. 397, setting a lighted candle under a stairway with intent to burn the house was held an attempt to commit arson. And see McDermott v. People, 5 Park. C. R. (N. Y.) 102.

It has been held that merely to point a loaded pistol or gun at another is not a sufficient act to

tempt.[44] Thus, it has been held that taking an impression of a key, and preparing a false key,[45] with intent to break and enter a store through the agency of another person, and sending the key to him and soliciting him to do the act, is an attempt to commit larceny from the store.[46] And it has been held that soliciting another to commit arson, and offering him a match for the purpose, is an attempt to commit arson.[47]

Prevailing Doctrine is to the Contrary.— This view, however, has been repudiated by most of the courts in which the question has

---

constitute an attempt to discharge the weapon, though it is cocked, and the party has his finger on the trigger, and expresses at the time an intention to shoot. Reg. v. Lewis, 9 Car. & P. 523; Reg. v. St. George, 9 Car. & P. 483. This, however, seems to be going too far. See State v. Shepard, 10 Iowa, 126; State v. Smith, 2 Humph. (Tenn.) 457; State v. Cherry, 11 Ired. (N. C.) 475.

[44] See the language of the different judges in Rex v. Higgins, 2 East, 5, quoted in the opinion of the court in Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569, Beale's Cas. 128, 129.

[45] Thus far it was clearly mere preparation. Ante, § 123.

[46] Griffin v. State, 26 Ga. 493.

[47] People v. Bush, 4 Hill (N. Y.) 135; State v. Bowers, 35 S. C. 262, 28 Am. St. Rep. 847.

arisen, and the better opinion is that solicitation to commit a crime is not an attempt. It is not an act done with intent to commit a crime, and which would apparently result in the commission of the contemplated crime, unless frustrated by extraneous circumstances. When punishable at all, it is punishable as a distinct misdemeanor.[48] In a leading Pennsylvania case it was held that delivering poison to a person and soliciting him to give it to another was not punishable under a statute as "an attempt to administer poison," but a conviction was sustained under a count charging the solicitation as a distinct offense.[49] There are many cases to substantially the same effect.[50] Thus, it has been held, contrary to the case mentioned above, that soliciting another to commit arson and furnishing him with matches is not an at-

[48] Post, § 130 et seq.

[49] Stabler v. Com., 95 Pa. St. 318, 40 Am. Rep. 653.

[50] Reg. v. Williams, 1 Car. & K. 589, 1 Den. C. C. 39; McDade v. People, 29 Mich. 50; State v. Harney, 101 Mo. 470; State v. Butler, 8 Wash. 194; Smith v. Com., 54 Pa. St. 209, 93 Am. Dec. 686; Com. v. Randolph, 146 Pa. St. 83, 28 Am. St. Rep. 782, Beale's Cas. 134. And see U. S. v. Stephens, 8 Sawy. 116, 12 Fed. 52, Beale's Cas. 130.

tempt to commit arson;[51] that soliciting a child under the age of consent to submit to sexual intercourse is not an attempt to rape;[52] and that soliciting another to commit incest or adultery is not an attempt to commit incest or adultery.[53]

126. Abandonment of Purpose.

If a man makes up his mind to commit a crime, and proceeds far enough to be guilty of an attempt, within the rules above stated, he does not purge himself of guilt by voluntarily abandoning his evil purpose. For example, if a man seizes a woman with intent to rape, he is none the less guilty of an attempt to rape because he repents and voluntarily desists.[54] It is different, of course, if the evil purpose is abandoned before a sufficient act has been done to constitute an attempt.[55] And voluntary abandonment, even after such an act has been done, may be evi-

---

[51] McDade v. People, 29 Mich. 50.

[52] State v. Harney, 101 Mo. 470.

[53] Cox v. People, 82 Ill. 191; State v. Butler, 8 Wash. 194; Smith v. Com., 54 Pa. St. 209, 93 Am. Dec. 686.

[54] Glover v. Com., 86 Va. 382, Beale's Cas. 133; Lewis v. State, 35 Ala. 380.

[55] Pinkard v. State, 30 Ga. 757.

dence tending to negative the intent charged.[56]

127. Adaptation of Means to Accomplishment of Purpose.

There has been considerable discussion in the cases as to the extent to which the means employed must be adapted to the accomplishment of the intended crime, in order to render one guilty of an attempt. It is clear that the means must not be obviously unsuitable. Thus, a person who should make an assault upon a dummy dressed as a woman, with intent to ravish, would not be guilty of a criminal intent to rape, for the law would not take cognizance of such an act, and the bare intent would not be punishable.[57] The same is true of presenting a weapon under such circumstances that it is obvious that no injury can be done.[58] There must be at least an apparent possibility of committing the intended crime.[59]

---

[56] State v. Allen, 47 Conn. 121; Harrell v. State, 13 Tex. App. 374. It is otherwise where the abandonment is involuntary. Reg. v. Bain, 9 Cox, C. C. 98; Taylor v. State, 50 Ga. 79.

[57] See People v. Gardiner, 25 N. Y. Supp. 1072.

[58] Tarver v. State, 43 Ala. 354.

[59] Rex v. Edwards, 6 Car. & P. 521; Allen v.

By the overwhelming weight of authority, the means adopted need not be absolutely capable of accomplishing the intended crime. An apparent adaptation is sufficient.[60]

128. Physical Impossibility to Commit Intended Crime.

It has been said that an attempt to commit a crime can only be made out when, if no interruption had taken place, the attempt could have been carried out successfully, and the intended crime committed;[61] and the rule has been applied in some of the cases.[62] This

State, 28 Ga. 395, 73 Am. Dec. 760; Henry v. State, 18 Ohio, 32; Tarver v. State, 43 Ala. 354; State v. Clarissa, 11 Ala. 57; Sipple v. State, 46 N. J. Law, 197. And see the cases cited in notes following.

[60] Rex v. Phillips, 3 Camp. 73; Reg. v. Brown, 24 Q. B. Div. 357; Reg. v. Goodall, 2 Cox, C. C. 41; Com. v. McDonald, 5 Cush. (Mass.) 365, Beale's Cas. 141; Com. v. Jacobs, 9 Allen (Mass.) 274; Hamilton v. State, 36 Ind. 280, 10 Am. Rep. 22; People v. Lee Kong, 95 Cal. 666, 29 Am. St. Rep. 165, Beale's Cas. 142; Mullen v. State, 45 Ala. 43, 6 Am. Rep. 691; and cases cited in notes following.

[61] Reg. v. Collins, 9 Cox, C. C. 497, Beale's Cas. 137 (since overruled).

[62] Thus, it has been held that an attempt to discharge a gun or pistol at a person is not in-

view, however, cannot be sustained. According to the decided weight of authority, both in England and in this country, an apparent possibility to commit the intended crime is sufficient. The fact that conditions exist which render the actual consummation of the crime impossible does not prevent the party from being guilty of an attempt, if the conditions are not known to him. Thus, it has repeatedly been held that a person who attempts to pick another's pocket is guilty of an attempt to commit larceny, though there is nothing in the pocket.[63] And the same

dictable, if, though unknown to the party making the attempt, it was not so loaded or primed that it could be discharged. Reg. v. Gamble, 10 Cox, C. C. 545.

[63] Com. v. Jacobs, 9 Allen (Mass.) 274; Com. v. McDonald, 5 Cush. (Mass.) 365, Beale's Cas. 141; State v. Wilson, 30 Conn. 500; People v. Moran, 123 N. Y. 254, 20 Am. St. Rep. 732; People v. Jones, 46 Mich. 441; Rogers v. Com., 5 Serg. & R. (Pa.) 462; People v. Bush, 4 Hill (N. Y.) 134.

The contrary was at one time held in England. Reg. v. Collins, 9 Cox, C. C. 497, Beale's Cas. 137; Reg. v. M'Pherson, Dears. & B. C. C. 197, 7 Cox, C. C. 281. But these cases have been overruled. Reg. v. Brown, 24 Q. B. Div. 357; Reg. v. Ring, 66 Law Times (N. S.) 300.

principle has been applied in many other cases.[64]

It was said by Mr. Justice Gray in a Massachusetts case: "Whenever the law makes

---

[64] In Clark v. State, 86 Tenn. 511, a person who had opened a drawer with intent to steal therefrom was held guilty of an attempt to commit larceny, though there was nothing in the drawer.

In Hamilton v. State, 36 Ind. 280, 10 Am. Rep. 22, a conviction of attempt to rob was sustained, where the accused had assaulted another with intent to rob him, though the person assaulted had no money on his person.

In State v. Beal, 37 Ohio St. 108, a person who had broken into a house with intent to steal therefrom was held guilty of burglary, though there was nothing in the house that could be stolen.

In Reg. v. Goodall, 2 Cox, C. C. 41, and Reg. v. Goodchild, 2 Car. & K. 293, convictions of attempt to procure a miscarriage were sustained, though the attempt was made upon the body of a woman who was not pregnant.

In People v. Lee Kong, 95 Cal. 666, 29 Am. St. Rep. 165, Beale's Cas. 142, a conviction of assault with intent to kill was sustained, where the accused had shot at a particular spot, with intent to kill a policeman whom he supposed to be concealed there, though it appeared that the policeman was in fact at another place.

An attempt to commit the crime of extorting money by putting another in fear is committed, notwithstanding the other is not really put in

one step towards the accomplishment of an unlawful object with the intent or purpose of accomplishing it criminal, a person taking that step, with that intent or purpose, and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that, by reason of some fact unknown to him at the time of his criminal attempt, it could not be fully carried into effect in the particular instance." [65] "If the means are both absolutely and apparently inadequate, as where a man threatens another with magic, or aims at him a child's popgun, then it is plain that an attempt, in the sense of an apparent invasion of another's rights, does not exist. * * * When the means used are so preposterous that there is not even apparent danger, then an indictable attempt is not made out."[66]

---

fear, but gives up the money for the purpose of afterwards prosecuting the offender. People v. Gardner, 144 N. Y. 119, 43 Am. St. Rep. 741, reversing 25 N. Y. Supp. 1072.

[65] Com. v. Jacobs, 9 Allen (Mass.) 274.

[66] 1 Whart. Crim. Law (10th Ed.) § 183, citing, among other cases, Reg. v. James, 1 Car. & K.

129. Legal Impossibility to Commit Intended Crime.

By the weight of authority, if, as a matter of law, the completed act accomplished as intended would not be a crime, the attempt to commit it is not criminal, whatever may be the party's state of mind. For example, it is not a crime at common law to procure an abortion with the consent of the woman, where she is not quick with child; and therefore an attempt to procure an abortion under such circumstances is not indictable, though the party may not know that the child has not quickened.[67] So, by the weight of authority, where it is held that a boy under fourteen years of age cannot commit the crime of rape, he cannot be guilty of an attempt to rape.[68] On the same principle it would seem clear that consent of the person against whom

530; Tarver v. State, 43 Ala. 354; Robinson v. State, 31 Tex. 170; Smith v. State, 32 Tex. 593.

[67] State v. Cooper, 22 N. J. Law, 52, 51 Am. Dec. 248.

[68] 1 Whart. Crim. Law (10th Ed.) § 184; Rex v. Eldershaw, 3 Car. & P. 396; Reg. v. Phillips, 8 Car. & P. 736; State v. Sam, 1 Winst. (N. C.) 300; State v. Handy, 4 Har. (Del.) 566. Contra, Com. v. Green, 2 Pick. (Mass.) 380, Beale's Cas. 139. And see People v. Randolph, 2 Park. Cr. R. (N. Y.) 213; Williams v. State, 14 Ohio, 222.

a crime is attempted must prevent the other party from being guilty of a criminal attempt to commit the crime, if it would prevent him from being guilty of the intended crime, but this is doubtful.[69]

---

[69] In People v. Gardiner, 25 N. Y. Supp. 1072, the accused had threatened to accuse a woman of a crime unless she would give him money, and she parted with the money, not under the influence of fear, but for the purpose of prosecuting him. It was held that, since he could not, under such circumstances, be guilty of the statutory crime of extortion by putting in fear, he was not guilty of a criminal attempt to commit such crime. This decision was reversed by the court of appeals in People v. Gardiner, 144 N. Y. 119, 43 Am. St. Rep. 741, and it was held that he was guilty of an attempt, for the same reason that a man who attempts to pick an empty pocket is guilty of an attempt to steal.

Consent after an attempt does not prevent the attempt from being a crime. Thus, a man who attempts to commit rape is none the less guilty because the woman afterwards consents to intercourse, so that rape is not committed. State v. Cross, 12 Iowa, 66, 79 Am. Dec. 519; State v. Hartigan, 32 Vt. 607, 78 Am. Dec. 609; State v. Atherton, 50 Iowa, 189, 32 Am. Rep. 134.

In Rex v. Edwards, 6 Car. & P. 521, it was held, in effect, that a person who forcibly compelled another to write an order for the payment of money, intending to take the order, was not guilty

III. SOLICITATION TO COMMIT CRIME.

130. In General.—According to the better opinion, it is a misdemeanor to solicit another to commit either a felony or a misdemeanor.[70] This doctrine, however, is not recognized in all jurisdictions to the full extent.

131. Solicitation to Commit a Felony.

The decided weight of authority, both in England and in the United States, is in favor of the doctrine that it is a misdemeanor merely to solicit another to commit a crime, if the crime be a felony, though nothing further is done towards carrying out the unlawful purpose. The solicitation, without more, is regarded as a sufficient act to take the case out of the sphere of mere intent. In a leading English case an indictment was sustained for soliciting a servant to steal his master's goods. It was argued that no crime was charged because "a mere intent to commit evil is not indictable, without an act done;" but the court held that the solicitation was sufficient to ren-

---

of an attempt to rob, as the act would not have been robbery if he had accomplished his purpose.

[70] Rex v. Higgins, 2 East, 5 (referred to in Beale's Cas. 129); Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569, Beale's Cas. 128; Com. v. Randolph, 146 Pa. St. 83, 28 Am. St. Rep. 782, Beale's Cas. 134; and cases cited in the notes following.

der the defendant accountable.[71] This case has repeatedly been followed both in England and in this country. Thus, in other cases it has been held an indictable offense to solicit any person to commit larceny or embezzlement,[72] or murder,[73] or arson,[74] or sodomy,[75] or adultery, where by statute adultery was made a felony,[76] or to utter forged bank bills, made a felony by statute.[77] There are some statements against this doctrine, but it is supported by an overwhelming weight of authority.[78]

---

[71] Rex v. Higgins, 2 East, 5.

[72] Reg. v. Quail, 4 Fost. & F. 1076; Reg. v. Daniell, 6 Mod. 99.

[73] Reg. v. Williams, 1 Car. & K. 589, 1 Den. C. C. 39; Bacon's Case, 1 Sid. 230, 1 Lev. 146; Stabler v. Com., 95 Pa. St. 318, 40 Am. Rep. 653; Com. v. Randolph, 146 Pa. St. 83, 28 Am. St. Rep. 782, Beale's Cas. 134.

[74] Com. v. Flagg, 135 Mass. 545. And see People v. Bush, 4 Hill (N. Y.) 133; State v. Bowers, 35 S. C. 262, 28 Am. St. Rep. 847; Com. v. Hutchinson, 42 W. N. C. (Pa.) 137, 6 Pa. Super. Ct. 405, 19 Pa. Co. Ct. 360.

[75] Rex v. Hickman, 1 Mood. C. C. 34; Reg. v. Rowed, 3 Q. B. 180, 6 Jur. 396.

[76] State v. Avery, 7 Conn. 266, 18 Am. Dec. 105.

[77] See State v. Davis, Tappan (Ohio) 171.

[78] Wharton, in discussing the question whether

132. Solicitation to Commit a Misdemeanor.

Whether solicitation to commit a misdemeanor is indictable is not so clear. Some of the courts have made a distinction in this respect between felonies and misdemeanors, and

---

solicitations to commit crimes are independently indictable, says: "They certainly are * * * when they in themselves involve a breach of the public peace, as is the case with challenges to fight and seditious addresses. They are also indictable when their object is interference with public justice, as where a resistance to the execution of a judicial writ is counseled; or perjury is advised; or the escape of a prisoner is encouraged; or the corruption of a public officer or a witness is sought, or invited by the officer himself. They are indictable, also, when they are in themselves offenses against public decency, as is the case with solicitations to commit sodomy; and they are indictable, also, when they constitute accessaryship before the fact. But * * * the better opinion is that, where the solicitation is not in itself a substantive offense, or (and) where there has been no progress made towards the consummation of the independent offense attempted, the question whether the solicitation is, by itself, the subject of penal prosecution, must be answered in the negative." 1 Whart. Crim. Law (10th Ed.) § 179.

This statement was approved by the supreme court of Illinois in Cox v. People, 81 Ill. 191. The indictment in this case, however, was for assault

have held that solicitation to commit a misdemeanor is not indictable at all,[79] though they hold that it is an offense to solicit the commission of a felony.[80] There is no more reason, however, for such a distinction in the case of solicitation, than there would be for holding an attempt to commit a misdemeanor not to be indictable; and there are many cases in which an indictment for solicitation

---

with intent to commit a felony (incest), and not merely for solicitation. Several other cases, sometimes cited as holding that solicitation to commit a felony is not indictable, do not so hold at all, but merely hold that solicitation is not indictable as an attempt, which, as we have seen, is very generally conceded. Ante, § 125, McDade v. People, 29 Mich. 50; State v. Harney, 101 Mo. 470; State v. Butler, 8 Wash. 194.

[79] Thus, in Smith v. Com., 54 Pa. St. 209, 93 Am. Dec. 686, it was held not to be an indictable offense to solicit a woman to commit adultery, since, by the laws of Pennsylvania, adultery was merely a misdemeanor. The court distinguished State v. Avery, 7 Conn. 266, 18 Am. Dec. 105 (supra, note 76), on the ground that, in Connecticut, adultery was a felony.

In Com. v. Willard, 22 Pick. (Mass.) 476, it was held, in effect, that solicitation to sell liquor in violation of law was not an indictable offense.

[80] See the cases cited in the notes to the section preceding.

to commit a misdemeanor has been sustained. Thus, indictments have been sustained for solicitation to commit embracery,[81] for soliciting a person who has been summoned as a witness for the state in a criminal prosecution to absent himself,[82] and for solicitation to accept a bribe,[83] or to pay a bribe.[84]

133. Solicitation not Indictable as an Attempt.

As was shown in a former section, some of the cases in which solicitation to commit a crime has been held to be an indictable offense proceed on the theory that mere solicitation is sufficiently an act done—"a step in the direction of the crime"—to constitute an attempt. But this view is not supported by the weight of authority. Solicitation is not an attempt. It is not an act done with intent to commit a crime, and which would apparently result in the commission of the contemplated crime unless frustrated by extraneous circumstances. If punishable at all, it is punishable as a distinct misdemeanor.[85]

---

[81] State v. Bonds, 2 Nev. 265.

[82] State v. Keyes, 8 Vt. 57.

[83] Rex v. Vaughan, 4 Burrows, 2494; Rex v. Plympton, 2 Ld. Raym. 1377; post, § 432.

[84] Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569, Beale's Cas. 128; post, § 432.

[85] See ante, § 125, and cases there cited.

IV. CRIMINAL CONSPIRACY.

134. In General.—It is a misdemeanor at common law, known as "conspiracy," for two or more persons to conspire or combine, either—

1. **To accomplish a criminal or unlawful purpose;**
2. **Or to accomplish a purpose not in itself criminal or unlawful by criminal or unlawful means.**

It is the unlawful combination or agreement that constitutes the offense, and no overt act is necessary.

As to Definition or Description of Offense.—The courts have found it difficult to frame a definition of the crime of conspiracy sufficiently accurate to include all agreements or combinations that are punishable, and at the same time avoid including some that are not punishable. Perhaps it cannot be done. The definition—or description, rather—given above has been adopted by some of the most eminent judges, and is sufficiently accurate as a definition. It was said by Chief Justice Shaw in a leading Massachusetts case: "Without attempting to review and reconcile all the cases, we are of opinion that as a general description, though perhaps not a precise and accurate definition, a conspiracy

must be a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means." [86]

In punishing a conspiracy the law does not punish mere intention. There is something more than this. There is an unlawful agreement or combination, and this is what constitutes the offense.

135. Overt Act Not Necessary.

The conspiring is a distinct offense, and to make it indictable nothing whatever need be done in execution of it. No overt act is necessary. If two men meet, and agree to commit a crime, they are guilty of a criminal conspiracy, and liable to indictment, though the very next moment they may change their minds and determine not to do so.[87]

---

[86] Com. v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346, Beale's Cas. 821. And see post, § 135.

[87] Poulterers' Case, 9 Coke, 55b, Beale's Cas. 801; Rex v. Edwards, 8 Mod. 320, Beale's Cas. 804; Com. v. Judd, 2 Mass. 329, 3 Am. Dec. 54; People v. Richards, 1 Mich. 216, 51 Am. Dec. 75, 80; People v. Mather, 4 Wend. (N. Y.) 229, 263, 21 Am. Dec. 122, 151; State v. Ripley, 31 Me. 386; State v. Buchanan, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534; State v. Younger, 1 Dev. (N. C.) 357, 17

136. The Conspiring or Agreement.

The term "conspiracy" imports an agreement. Unless this is shown, the crime is not made out.[88] But the agreement need not be a formal one. It need not be manifested by any formal words, written or spoken. It is

---

Am. Dec. 571; Com. v. McKisson, 8 Serg. & R. (Pa.) 420; State v. Crowley, 41 Wis. 271; O'Connell v. Reg., 11 Cl. & F. 155, 1 Cox, C. C. 413; State v. Cawood, 2 Stew. (Ala.) 360; State v. Pulle, 12 Minn. 164.

The statute of New York has modified the common law in this respect by requiring that, to constitute the crime of conspiracy, there must be both an agreement and an overt act to effect the object of the agreement, except where the conspiracy is to commit some "felony upon the person of another, or to commit arson or burglary." Pen. Code, § 171. See People v. Flack, 125 N. Y. 324. And there are similar statutes in several other states.

[88] Mulchy v. Reg., L. R. 3 H. L. 306.

"Of course, a mere discussion between parties about entering into a conspiracy, or as to the means to be adopted for the performance of an unlawful act, does not constitute a conspiracy, unless the scheme, or some proposed scheme, is in fact assented to,—concurred in by the parties in some manner, so that their minds meet for the accomplishment of the proposed unlawful act." Per Dyer, J., in U. S. v. Goldberg, 7 Biss. 175, 180, Fed. Cas. No. 15,223.

sufficient if the minds of the parties meet understandingly, so as to bring about an intelligent and deliberate agreement to do the acts contemplated.[89]

All of the conspirators need not enter into the agreement at the same time. When a new party, with knowledge of the facts, concurs in the plans of the original conspirators, and comes in to aid in the execution of them, he is from that moment a co-conspirator. He

---

[89] "Concurrence of sentiment and co-operative conduct in an unlawful and criminal enterprise, and not formality of speech, are the essential ingredients of criminal conspiracy." McKee v. State, 111 Ind. 378. And see People v. Mather, 4 Wend. (N. Y.) 229, 260, 21 Am. Dec. 122, 147; Gibson v. State, 89 Ala. 121, 18 Am. St. Rep. 96; Spies v. People, 122 Ill. 170, 3 Am. St. Rep. 320.

"It is not necessary, to constitute a conspiracy, that two or more persons should meet together, and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme is to be, and the details of the plan, or means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design." Dyer, J., in U. S. v. Goldberg, 7 Biss. 175, 180, Fed. Cas. No. 15,223.

commits the offense whenever he agrees to become a party to the transaction; and doing any act in furtherance of the original design shows his concurrence, though it is not necessary to make him guilty.[90]

The crime of conspiracy cannot be committed by less than two persons, for, in the nature of things, less than two cannot make an agreement.[91] At common law, husband and wife are regarded as but one person, so that they cannot enter into an agreement, and therefore they cannot be guilty of conspiracy; and this rule still obtains, unless the common law has been changed by statute.[92] Another result of the necessity of two persons to commit this offense is that, where two are indicted, an acquittal of one is necessarily an acquittal of the other. But the death of one conspirator will not prevent a trial and conviction of the other.[93]

---

[90] People v. Mather, 4 Wend. (N. Y.) 229, 260, 21 Am. Dec. 122, 147; Spies v. People, 122 Ill. 1, 3 Am. St. Rep. 320; U. S. v. Sacia, 2 Fed. 754.

[91] State v. Glidden, 55 Conn. 46, 3 Am. St. Rep. 23; State v. Setter, 57 Conn. 461, 14 Am. St. Rep. 121.

[92] People v. Miller, 82 Cal. 107; State v. Covington, 4 Ala. 603.

[93] Rex. v. Niccolls, 2 Strange, 1227; People v.

137. The Unlawful Purpose—In General.

As was stated in a previous section, a conspiracy may be described generally as a combination to accomplish some criminal or unlawful purpose, or to accomplish some purpose that is not in itself criminal or unlawful by criminal or unlawful means.[94] In other words, the purpose or means may be criminal, or they may be, not criminal, but merely unlawful. The difficulty is in determining what purposes are unlawful within the meaning of the law. A conspiracy to do an act that is not unlawful by means that are not unlawful is not indictable, whatever the intent may be.[95]

Olcott, 2 Johns. Cas. (N. Y.) 301, 1 Am. Dec. 168; Com. v. Edwards, 135 Pa. St. 474.

[94] Com. v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346, Beale's Cas. 821. And see, to the same effect, Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321; Smith v. People, 25 Ill. 17, 76 Am. Dec. 780, Beale's Cas. 811; Reg. v. Parnell, 14 Cox, C. C. 508; State v. Mayberry, 48 Me. 218; State v. Donaldson, 32 N. J. Law, 151, 90 Am. Dec. 649, Beale's Cas. 828.

[95] See Com. v. Kostenbander, 17 W. N. C. (Pa.) 303, Beale's Case, where it was held (by a divided court, however,) that an indictment would not lie against several persons for conspiracy to induce another to sell them liquor in violation of

In a leading case in Maryland,[96] Judge Buchanan exhaustively reviewed the early English cases, and concluded that an indictment would lie in the following cases:

1. For a conspiracy to do any act that is criminal *per se.*

2. For a conspiracy to do an act not illegal, nor punishable, if done by an individual, but immoral only.

3. For a conspiracy to do an act neither illegal nor immoral in an individual, but to effect a purpose which has a tendency to prejudice the public.

4. For a conspiracy to extort money from another, or to injure his reputation, by means not indictable if practiced by an individual.

5. For a conspiracy to cheat and defraud a third person, accomplished by means of an act which would not in law amount to an indictable cheat, if effected by an individual.

6. For a malicious conspiracy to impoverish or ruin a third person in his trade or profession.

---

law, and then sue him as informers for the penalty.

[96] State v. Buchanan, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534.

7. For a conspiracy to defraud a third person by means of an act not *per se* unlawful, and though no person be injured thereby.

8. For a bare conspiracy to cheat and defraud a third person, though the means of effecting it may not be determined on at the time.

138. The Means to be Employed.

If the object of a conspiracy is a crime or otherwise unlawful, the means by which it is to be accomplished are altogether immaterial.[97] But if the object is not unlawful, unlawful means of accomplishing it must be contemplated.[98] This distinction is important in determining the sufficiency of indictments for conspiracy. In the first case the means need not be set out in the indictment, while in the latter they must.[99]

---

[97] Rex v. Eccles. 1 Leach, C. C. 274; Smith v. People, 25 Ill. 17, 76 Am. Dec. 780, Beale's Cas. 811; State v. Buchanan, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534; Com. v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346, Beale's Cas. 821; People v. Richards, 1 Mich. 216, 51 Am. Dec. 75; Com. v. McKisson, 8 Serg. & R. (Pa.) 420, 11 Am. Dec. 630.

[98] Smith v. People, supra; People v. Richards, supra; Com. v. Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; State v. Crowley, 41 Wis. 271.

[99] See the cases above cited.

When the object of the conspiracy is unlawful, it is not even necessary that the means of accomplishing it shall be agreed upon at the time.[100]

139. Conspiracy to Commit Crime—In General.

Nothing is better settled in the criminal law than the doctrine that a conspiracy to commit any crime, either as an end or as the means of accomplishing an end not criminal, is a misdemeanor at common law; and it is immaterial whether the intended crime be a felony or merely a misdemeanor, and whether it be criminal at common law or by statute only.[101] For this proposition, said Judge Buchanan in the case above referred to, "it can scarcely be necessary to offer any authority." [102] Conspiracy to obtain money or property by false pretenses is clearly indictable where there is a statute punishing the obtaining of money or property by such

---

[100] State v. Crowley, 41 Wis. 271; Rex v. Gill, 2 Barn. & Ald. 204.

[101] Reg. v. Bunn, 12 Cox, C. C. 316; Beasley, C. J., in State v. Donaldson, 32 N. J. Law, 151, 90 Am. Dec. 649, Beale's Cas. 828; State v. Glidden, 55 Conn. 46.

[102] State v. Buchanan, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534.

means.[103] The same is true of conspiracy to commit an assault and battery, or to procure the false imprisonment of another,[104] to rob or steal,[105] etc.

140. Conspiracy to Pervert or Obstruct Justice.

To willfully obstruct or pervert the course of public justice is a misdemeanor at common law, and therefore a conspiracy to effect such a purpose is clearly indictable as a conspiracy to commit a crime. Thus, it is a crime to conspire to obstruct an officer in the discharge of his official duty;[106] to fabricate or destroy evidence, as by introducing false affidavits or certificates in evidence, by suppressing a will, etc.,[107] or by passing a person off as the heir

---

[103] Reg. v. Hudson, 8 Cox, C. C. 305, Beale's Cas. 158; Orr v. People, 63 Ill. App. 305; People v. Butler, 111 Mich. 483.

[104] State v. McNally, 34 Me. 210, 56 Am. Dec. 650; Com. v. Putnam, 29 Pa. St. 296. Conspiracy to have a sane woman declared insane, and confined in an asylum, is indictable. Com. v. Spink, 137 Pa. St. 255.

[105] People v. Richards, 67 Cal. 412, 56 Am. Rep. 716; Miller v. Com., 78 Ky. 15, 39 Am. Rep. 194.

[106] State v. Noyes, 25 Vt. 415, 420; State v. McNally, 34 Me. 210, 56 Am. Dec. 650.

[107] State v. DeWitt, 2 Hill (S. C.) 282, 27 Am. Dec. 374. In Rex v. Mawbey, 6 Term R. 619, an

of a decedent to obtain a part of his estate;[108] to procure criminal process for improper purposes;[109] to enforce by legal process the payment of sums not due;[110] or to pack a jury.[111] A conspiracy between a witness and others for the former not to appear in obedience to a summons on the trial of an indictment is an indictable conspiracy.[112]

141. Conspiracy to do Immoral Acts.

A conspiracy to accomplish an object that is immoral is clearly indictable, if the act contemplated is an offense against the public morals, as an act of public indecency or immorality.[113] And even when the object of a conspiracy is not of this character, if it is immoral, it is indictable. The object need

---

indictment was sustained for conspiracy to pervert the course of justice by producing in evidence a false certificate by justices of the peace that a highway was repaired, to influence the judgment of the court on an indictment for failure to repair.

[108] Rex v. Robinson, 1 Leach, C. C. 37.

[109] Slomer v. People, 25 Ill. 70, 76 Am. Dec. 786.

[110] Reg. v. Taylor, 15 Cox, C. C. 265, 268.

[111] O'Donnell v. People, 41 Ill. App. 23.

[112] Reg. v. Hamp, 6 Cox, C. C. 167; People v. Chase, 16 Barb. (N. Y.) 495.

[113] Post, § 458, et seq.

not be an indictable offense. Thus, in a leading English case,[114] an indictment was sustained for a conspiracy to place a girl, with her own consent, in the hands of a man for the purpose of prostitution, though neither seduction nor prostitution in private was indictable at common law. The immoral object made the conspiracy indictable.[115] It has also been held an indictable offense to conspire to persuade a woman and her parents that a forged license is genuine, and that one of the conspirators is a justice of the peace, and thus gain their consent to a sham marriage.[116]

142. Conspiracy to Commit a Mere Private Wrong —In General.

There are some cases in which it has been held (by Lord Ellenborough, among others) that to render a conspiracy indictable there

---

[114] Rex v. Delaval, 3 Burrows, 1434, 1 W. Bl. 410, 439, Beale's Cas. 101.

[115] And see Rex v. Grey, 9 How. St. Tr. 127, 1 East, P. C. 460; Smith v. People, 25 Ill. 17, 76 Am. Dec. 780, Beale's Cas. 811 (conspiracy to fraudulently procure a girl to have carnal connection with a man); Reg. v. Howell, 4 Fost. & F. 160; Reg. v. Mears, 2 Den. C. C. 79, 4 Cox, C. C. 425; State v. Powell, 121 N. C. 635.

[116] State v. Murphy, 6 Ala. 765, 41 Am. Dec. 79. And see State v. Wilson, 121 N. C. 650.

must be a combination to commit some act that is known as an offense at common law, or that has been declared an offense by statute, and that a conspiracy, therefore, to commit a mere private fraud or private trespass, is not criminal.[117] But the overwhelming weight of authority is against these decisions. To render a conspiracy criminal, it is not at all necessary that a criminal act shall be contemplated, either as the end or as a means. It is a misdemeanor to conspire to commit against another a mere private wrong, the only effect of which would be to render the wrongdoers liable to an action for damages, if acting individually. While the contemplated wrong would not be indictable, the unlawful com-

[117] Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321 (but see People v. Richards, 1 Mich. 216, 51 Am. Dec. 75); Com. v. Prius, 9 Gray (Mass.) 127, Beale's Cas. 810 (but see Com. v. Warren, 6 Mass. 74); State v. Rickey, 9 N. J. Law, 293 (disapproved in State v. Norton, 23 N. J. Law, 44 and State v. Donaldson, 32 N. J. Law, 151, 90 Am. Dec. 649, Beale's Cas. 828). And see Rex v. Pywell, 1 Starkie 402, Beale's Cas. 807; Rex v. Turner, 13 East, 228, Beale's Cas. 805 (disapproved in Reg. v. Rowlands, 5 Cox, C. C. 436, 490, per Lord Campbell; and in Mifflin v. Com., 5 Watts & S. (Pa.) 461, 463, per Chief Justice Gibson).

bination to commit it, because of the increased power to injure, is regarded as so far injurious to the public at large as to require the state to interfere. Hawkins says: "There can be no doubt that all combinations whatsoever, wrongfully to prejudice a third person, are highly criminal at common law." [118] And Chitty says: "All confederacies wrongfully to prejudice another are misdemeanors at common law, whether the intention is to injure his property, his person, or his character." [119]

143. Conspiracy to Commit a Trespass.

In accordance with this doctrine it is well settled that a conspiracy to commit any trespass upon the property of another, real or

---

[118] 1 Hawk, P. C. c. 72; Rex v. Edwards, 8 Mod. 320, Beale's Cas. 804.

[119] 3 Chit. Crim. Law, 1139. And see the cases cited specifically in the following notes.

An indictment has been sustained for conspiracy to effect the escape of a female infant, with a view to her marriage against her father's will, Mifflin v. Com., 5 Watts & S. (Pa.) 461, 40 Am. Dec. 527; for conspiracy to seduce a minor son and heir, "and carry him out of the custody, counsel, and government of his father," with design to marry him to a woman of ill fame, Rex v. Thorp, 5 Mod. 221.

personal, is indictable at common law, though the intended trespass may be nothing more than a civil injury, and would not be indictable if committed.[120]

144. Conspiracy to Defraud.

The doctrine has also been frequently applied to conspiracies to perpetrate a fraud upon others. To obtain another's money or goods by mere false representations, without using false weights, measures, or tokens, is a mere private wrong at common law, and not an indictable cheat, and yet it has been held an indictable offense to conspire to defraud by such means.[121] And the same is true of any other conspiracy to defraud by means that are not criminal, but merely wrongful.[122]

---

[120] Wilson v. Com., 96 Pa. St. 56.

[121] Reg. v. Mackarty, 2 Ld. Raym. 1179; Rex v. Wheatly, 2 Burrows, 1125, Beale's Cas. 97; Com. v. Warren, 6 Mass. 74. See, also, Reg. v. Hudson, 8 Cox, C. C. 305, Beale's Cas. 158.

[122] Rex v. Edwards, 8 Mod. 320, Beale's Cas. 804; Reg. v. Warburton, L. R. 1 C. C. 274, Beale's Cas. 808; State v. Buchanan, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534; People v. Richards, 1 Mich. 216, 51 Am. Dec. 75; People v. Underwood, 16 Wend. (N. Y.) 546; Johnson v. People, 22 Ill. 314; and cases cited in the notes following.

Other Illustrations of Conspiracy to Defraud.—Thus, indictments have been sustained for conspiracy to falsely read a release to an illiterate man, and thereby induce him to sign it;[123] to persuade a man to bet on a race that is to be fraudulently run;[124] to get a man drunk and cheat him at cards;[125] to cheat one out of his land;[126] to obtain goods from a merchant without paying for them;[127] to induce a person, by false representations, to forego a legal claim;[128] to dispose of goods in contemplation of bankruptcy, with intent to defraud creditors;[129] to conduct a mock auction, or stifle competition at

---

[123] Reg. v. Skirret, Sid. 312.

[124] Reg. v. Orbell, 6 Mod. 42.

[125] State v. Younger, 1 Dev. (N. C.) 357, 17 Am. Dec. 571.

[126] People v. Richards, 1 Mich. 216, 51 Am. Dec. 75.

[127] Reg. v. Orman, 14 Cox, C. C. 381; Com. v. Ward, 1 Mass. 473; Com. v. Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596.

[128] Reg. v. Carlisle, Dears. C. C. 337, 6 Cox, C. C. 336.

[129] Reg. v. Hall, 1 Fost. & F. 33. And see Heymann v. Reg., L. R. & Q. B. 102, 12 Cox, C. C. 383, 28 L. T. (N. S.) 162; Com. v. Goldsmith, 12 Phila. 632.

an auction sale.[130] And many other cases might be cited.[131]

145. Conspiracy to Slander or Extort Money.

It is also well settled that it is a misdemeanor at common law for two or more persons to conspire to slander another, or to make a false charge against him, either for the purpose of injuring his reputation, or for the purpose of extorting money from him, as in the case of blackmail, though verbal defamation and extortion of money otherwise than under color of office are not crimes at all at common law.[132]

---

[130] Reg. v. Lewis, 11 Cox, C. C. 404; Levi v. Levi, 6 Car. & P. 239.

[131] See Reg. v. Brown, 7 Cox, C. C. 442; Reg. v. Kenrick, 5 Q. B. 49, 7 Jur. 848; Ellzey v. State, 57 Miss. 827; State v. Cole, 39 N. J. Law. 324.

Conspiracy between a servant and another to sell the master's goods at less than the proper price, and divide the difference, or otherwise defraud the master. Reg. v. De Kromme, 17 Cox, C. C. 492.

Conspiracy between a female servant and a man for the latter to personate her master, and marry her, with intent to defraud her master's relations out of a part of his property. Rex v. Robinson, 1 Leach, C. C. 37, 2 East, P. C. 1010.

[132] As conspiracy to falsely charge one with be-

146. Conspiracy to Injure Another in His Trade or Calling.

It is also an indictable offense at common law to maliciously conspire to injure another in his trade or calling by means that are wrongful, though not criminal,[133] as to ruin a tradesman's business by bribing his servants or apprentices to make inferior goods;[134] or to hinder a tradesman from ex-

---

ing the father of a bastard child. Timberley's Case, Sid. 68; Child v. North, 1 Keb. 203; Rex v. Armstrong, Vent. 304; Reg. v. Best, 2 Ld. Raym. 1167.

For other cases of conspiracy to slander or extort money, see Rex v. Kinnersley, 1 Strange, 193; Rex v. Parsons, 1 W. Bl. 392; Rex v. Ripsal, 1 W. Bl. 368, 3 Burrows, 1320; Com. v. Tibbetts, 2 Mass. 536; State v. Hickling, 41 N. J. Law, 208, 32 Am. Rep. 198; Elkin v. People, 28 N. Y. 177; People v. Dyer, 79 Mich. 480; State v. Jackson, 82 N. C. 565. See, also, State v. Buchanan, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534, where the early cases are reviewed and discussed.

[133] Rex v. Cope, 1 Strange, 144; Rex v. Eccles, 1 Leach, C. C. 274; Rex v. Leigh, 2 Camp. 372, note; Reg. v. Druitt, 10 Cox, C. C. 592; State v. Donaldson, 32 N. J. Law, 151, 90 Am. Dec. 649, Beale's Cas. 828; Crump v. Com., 84 Va. 927, 10 Am. St. Rep. 895, Beale's Cas. 833.

[134] Rex v. Cope, 1 Strange, 144. In this case, a prosecution was sustained for conspiracy to ruin

ercising his trade, or a laborer or mechanic from obtaining employment;[135] or to impoverish and ruin an actor by hissing him and driving him from the stage;[136] or to compel a master to discharge a workman.[137]

147. Conspiracy to do Acts Prejudicial to the Public Generally.

The ground upon which any act is punished as a crime is because it injures, or tends to injure, the community at large; and therefore, in this sense, all criminal conspiracies are prejudicial to the public, and are punished for this reason. In this section the expression is used in a narrower sense, to denote acts which are peculiarly prejudicial to the public generally, as distinguished from individuals. It has been laid down broadly that an indictment will lie at common law for a conspiracy to do an act which is neither illegal nor immoral in an individual, but to effect a purpose which has a tendency to injure the

---

the trade of a card maker by bribing his apprentices to put grease into the paste, so as to spoil the cards.

[135] Rex v. Eccles, 1 Leach, C. C. 274.

[136] Rex v. Leigh, 2 Camp. 372, note.

[137] State v. Donaldson, 32 N. J. Law, 151, 90 Am. Dec. 649, Beale's Cas. 828.

public. Thus, in a leading Massachusetts case it was held indictable to conspire to manufacture base and spurious indigo, with a fraudulent intent to sell the same to the public generally as genuine.[138] Indictments have also been sustained for conspiracies to fraudulently put valueless shares in companies on the market, or to give shares a fictitious market value,[139] and conspiracies to conduct a mock auction, with pretended bidders,[140] etc.

148. Combinations among Workmen.

There are some cases in the reports in which it has been held à crime for workmen in any particular trade or calling to combine for the purpose of raising their wages, on the ground that such combinations are injurious to trade. In an early English case journeymen tailors were indicted for a conspiracy to raise their wages by refusing to work for less than a certain sum, and the indictment was

---

[138] Com. v. Judd, 2 Mass. 329, 3 Am. Dec. 54, Beale's Cas. 54. See, also, McKee v. State, 111 Ind. 378.

[139] Scott v. Brown (1892) 2 Q. B. 724. And see Reg. v. Aspinall, L. R. 2 Q. B. 48, 13 Cox, C. C. 563.

[140] Reg. v. Lewis, 11 Cox, C. C. 404.

sustained, though it was conceded that it would have been perfectly lawful for either of the defendants to raise his wages if he could, and to refuse to work unless he should be paid what he demanded.[141] There have been some decisions to the same effect in this country.[142] These decisions, however, have not been generally followed. By the weight of authority it is not unlawful, either in England or in this country, for workmen to combine, by the formation of labor unions or otherwise, for the purpose of mutual protection against oppression or unfairness on the part of employers, provided they do not resort to or contemplate unlawful means to carry out their objects.[143]

---

[141] Rex v. Journeymen Tailors of Cambridge, 8 Mod. 10, Beale's Cas. 820.

[142] People v. Fisher, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501; People v. Trequier, 1 Wheeler, C. C. (N. Y.) 142.

[143] Com. v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346, Beale's Cas. 821; Reg. v. Shepherd, 11 Cox, C. C. 325. See note, 28 Am. Dec. 529.

In Reg. v. Rowlands, 2 Den. C. C. 364, 17 Q. B. 671, 5 Cox, C. C. 466, it was said: "The law is clear that workmen have a right to combine for their own protection, and to obtain such wages as they choose to agree to demand." And in Reg. v. Duf-

But if the agreement between workmen contemplates the use of unlawful means for accomplishing their object, they are guilty of a criminal conspiracy, though the object may be innocent. Thus, they are criminally responsible if they contemplate coercing an employer to discharge an employe in violation of a contract, or breaking a contract into which they have entered themselves.[144] And a conspiracy to compel an employer to discharge an employe has been held indictable even where there was no contract for any fixed time.[145] Such a conspiracy is to injure a per-

---

field, 5 Cox, C. C. 404, it was said: "With respect to the law relating to combinations of workmen, nothing can be more clearly established, in point of law, than that workmen are at liberty, while they are perfectly free from engagement, and have the option of entering into employ or not, * * * to agree among themselves to say, 'We will not go into any employ unless we can get a certain rate of wages.'"

[144] Com. v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346, Beale's Cas. 821; State v. Donaldson, 32 N. J. Law, 151, 90 Am. Dec. 649, Beale's Cas. 828; State v. Glidden, 55 Conn. 46; Reg. v. Duffield, 5 Cox, C. C. 404.

[145] State v. Donaldson, 32 N. J. Law, 151, 90 Am. Dec. 649, Beale's Cas. 828; State v. Stewart, 59 Vt. 273, 59 Am. Rep. 710; Reg. v. Hewitt, 5

son in his trade or calling, within the principle referred to in a previous section.[146] Nor can workmen lawfully combine, and by intimidation, blacklisting, or boycotting prevent employers from obtaining trade, or other workmen from obtaining employment.[147] The use of mere persuasion, however, without any intimidation, does not make the combination criminal.[148]

149. Combinations to Raise or Lower Prices.

In an English case it was held an indictable offense to conspire by false rumors to raise the price of the public government funds, with intent to injure such of the king's subjects as should purchase on a particular day, though it was conceded that to raise or lower the price of such funds was not a crime *per*

Cox. C. C. 162. And see People v. Fisher, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501.

[146] Ante, § 144.

[147] Reg. v. Duffield, 5 Cox, C. C. 404; Reg. v. Hewitt, 5 Cox, C. C. 162; Reg. v. Rowlands, 2 Den. C. C. 364, 17 Q. B. 671; Reg. v. Druitt, 10 Cox, C. C. 593; Reg. v. Bunn, 12 Cox, C. C. 316; State v. Glidden, 55 Conn. 76; Crump v. Com., 84 Va. 927, 10 Am. St. Rep. 895, Beale's Cas. 833; State v. Stewart, 59 Vt. 273, 59 Am. Rep. 710,

[148] Reg. v. Shepherd, 11 Cox, C. C. 325,

se.[149] And so it is of a conspiracy to raise the price of flour, salt, coal, or any other commodity in general use, by "cornering" the market.[150]

V. CONSENT AS BETWEEN INDIVIDUALS.

150. In General.—Consent as between individuals is no defense on a prosecution for an act which directly injures or tends to injure the community at large, as breaches of the peace, acts tending to corrupt the public morals, homicide, mayhem, etc. But rape, perhaps assault, and, as a rule, offenses against property, are not committed where the person against whom the act is committed consents; and it can make no difference that the consent is given merely for the purpose of prosecution, and that it is not known to the other party.

When Consent is No Defense.—It has been said that the maxim "*Volenti non fit in-*

[149] Rex v. Berenger, 3 Maule & S. 68. And see dicta to this effect in People v. Fisher, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501.

[150] Rex v. Norris, 2 Ld. Kenyon, 300; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173, 8 Am. Rep. 159. Beale's Cas. 839. See, also, Rex v. Hilbers, 2 Chit. 163.

In a late Kentucky case it was held that it is not criminal, at common law, for insurance companies or agents to combine to maintain rates of insurance. Aetna Ins. Co. v. Com. (Ky.) 51 S. W. 624. It was so held under a statute in Texas.

juria," applies in criminal as well as in civil cases, but this is far from true. It applies very generally in a civil action, when the person injured by an alleged wrong is seeking to recover damages, and when the controversy is solely between the individuals themselves, for it is only reasonable that a man who has consented to an act, and thereby brought injury upon himself, should not be heard to complain. The reason for the rule, however, does not apply to the full extent to crimes, which are punished because of the wrong and injury to the public, and not merely because of the injury to the individual.

If an act is punished because of the injury to the community at large, rather than because of any injury to a particular individual, consent of the individual does not make it any the less a crime, nor prevent the state from punishing it. For example, a breach of the peace is punished because of the injury to the public, and, on a prosecution for an act constituting a breach of the peace, consent of the parties engaged is no defense. Prize

Queen Ins. Co. v. State, 86 Tex. 250. But the contrary was held under the Kansas statute. State v. Phipps, 50 Kan. 609.

fighting and affrays are within this principle. They are none the less crimes because the fighting is by agreement.[151] And so it is of acts which are punished because of their tendency to corrupt public morals, or shock the sense of public decency, etc., as open and notorious lewdness, bigamy, seduction, incest, etc.[152]

There are some offenses, directed more particularly against individuals, which constitute crimes, notwithstanding the consent of the person injured. Public policy requires that the right to life and member be regarded as inalienable, and consent of the person injured is no defense on a prosecution for homicide or mayhem. Where a man, to have an excuse for begging, caused another to cut off his hand, both were indicted and convicted.[153] It is murder to kill another in a duel,[154] and a

---

[151] Rex v. Billingham, 2 Car. & P. 234; State v. Burnham, 56 Vt. 445, 48 Am. Rep. 801; Com. v. Collberg, 119 Mass. 350, 20 Am. Rep. 328, Beale's Cas. 148.

[152] Tucker v. State, 8 Lea (Tenn.) 633. And see post, § 458, et seq.

[153] Wright's Case, Co. Litt. 127 a, Beale's Cas. 145.

[154] Reg. v. Barronet, Dears. C. C. 51.

person who counsels, aids, or abets another in the commission of suicide is guilty as an accessary before the fact, or as principal in the second degree.[155] On the same principle, a person is guilty of manslaughter if he causes another's death in a prize fight, or in an unlawful game, notwithstanding the other's consent to the fight or game.[156] The same is true of homicide in committing an abortion.[157]

Offenses in Which Want of Consent is Necessary.—There are some crimes against the persons of individuals which cannot be committed except without the consent of the person injured. Rape is such an offense. It is not committed where the woman freely consents to the intercourse, however reluctantly.[158] The same is true, according to the better opinion, of assaults and assault and battery. Some courts have held that on a charge of assault or assault and battery, consent of

---

[155] See Com. v. Mink, 123 Mass. 422, 25 Am. Rep. 109; State v. Levelle, 34 S. C. 120.

[156] Reg. v. Bradshaw, 14 Cox, C. C. 83, Beale's Cas. 146.

[157] State v. Moore, 25 Iowa, 128, 95 Am. Dec. 776; post, § 263(d).

[158] Post, § 293, et seq.

the person injured is no defense,[159] but this view is not sound.[160] If the assault is committed under such circumstances as to constitute a breach of the peace, as in the case of a prize fight or affray, an indictment will lie, notwithstanding the consent, but the indictment in such a case should be for the breach of the peace, and not for the assault.[161]

As a rule, offenses against property, from their very nature, can only be committed in the absence of consent on the part of the person against whom they are committed. To constitute larceny, there must be a trespass in taking the property, and this cannot be where the owner freely consents to part with the property. It can make no difference that he consents for the purpose of afterwards prosecuting the party, and that the fact that he consents is not known to the other party.[162]

The same is true of robbery, to constitute

---

[159] Com. v. Collberg, 119 Mass. 350, 20 Am. Rep. 328, Beale's Cas. 148; post, §§ 216, 217.

[160] See Reg. v. Martin, 2 Mood. C. C. 123, Beale's Cas. 146; State v. Beck, 1 Hill (S. C.) 363, 26 Am. Dec. 190; Reg. v. Woodhurst, 12 Cox, C. C. 443; Reg. v. Day, 9 Car. & P. 722

[161] State v. Burnham, 56 Vt. 445, 48 Am. Rep. 801.

[162] See People v. Hanselman, 76 Cal. 460, 9 Am.

which the property must be taken from the person or in the presence of another by violence, or by putting him in fear.[163] And it is true, also, of burglary, in which there must be a breaking and entry.[164]

Statutory Offenses in Which Consent is No Defense.—There are many offenses punished by statute in which consent of the person more particularly injured is no defense. Among these may be mentioned bigamy,[165] incest,[166] seduction,[167] and carnal knowledge of girls under a certain age.[168]

151. Going beyond the Consent.

Consent can be relied upon as a defense only when the act was within the consent. Thus, when a man hands another goods, with the understanding that he may take them on paying for them, and the other runs off with

---

St. Rep. 238; Reg. v. Lawrance, 4 Cox, C. C. 438; post, § 318.

[163] Connor v. People, 18 Colo. 373, 36 Am. St. Rep. 295; McDaniel's Case, Fost. C. L. 121, Beale's Cas. 152; post, § 376.

[164] Rex v. Egginton, 2 Leach, C. C. 913; Allen v. State, 40 Ala. 334.

[165] Post, § 459.

[166] Post, § 460.

[167] Post, § 464.

[168] Post, § 298

them without paying, there is no such consent to part with the goods as will defeat an indictment for larceny.[169] There is some difficulty and conflict of opinion as to the application of this principle, as we shall see at length in treating of larceny, assault, and rape.[170]

152. Persons Incapable of Consenting.

In any case, in order that the consent of the person injured may be a defense, he or she must have been capable of consenting. Thus, though want of consent is an essential element of rape, it is rape, even at common law, to have carnal knowledge of a girl under ten years of age, whether she consents or not, for the law considers that a child of such tender years has not sufficient capacity to consent to intercourse.[171] The same is true of a woman who is insensible through sleep, drugs, drunkenness, or any other cause.[172] In some states, statutes punish the carnal knowledge of girls, even when they are as old as eighteen years, whether they consent or not.[173]

---

[169] Post, § 318(c).
[170] Post, §§ 220, 297, 318.
[171] Post, § 298.
[172] Post, § 295.
[173] Post, § 298.

153. Consent Induced by Duress.

Consent induced by duress so great as to be sufficient to reasonably destroy free will is only apparent consent, and is no defense. Thus, consent of a woman to sexual intercourse, or of a man to part with his property, is no defense in a prosecution for assault, rape, robbery, or larceny, if the consent was induced by threats of death or great bodily harm.[174] The degree of duress may be so slight as not to vitiate consent. The degree required will vary according to the act.[175]

154. Consent Induced by Fraud.

Whether fraud vitiates consent is not clear, and there is much conflict in the decisions. The question has arisen in prosecutions for assault, rape, and larceny, and will be considered in dealing with those crimes.[176]

VI. RECOVERY IN A CIVIL ACTION.

155. In General.—On a criminal prosecution, it is no defense that the person injured has recovered damages or been defeated in a civil action.

If an action is brought against a wrongdoer

---

[174] Post, §§ 218, 296, 318(d), 370.

[175] As to rape, see post, § 293. As to robbery, see post, § 370. As to larceny, see post, § 318(d). As to assault, see post, § 218.

[176] Post, §§ 220, 297, 318. See Reg. v. Williams, 8 Car. & P. 286; Reg. v. Case, 4 Cox, C. C. 220.

to recover damages for the wrong, a judgment either for the plaintiff or for the defendant is a bar to any further action between the parties for the same wrong. But when a tort is also a crime, neither a recovery by the party injured nor a judgment against him in a civil action will bar a prosecution by the state for the wrong and injury to the public. Thus, on a prosecution for larceny, or a kindred crime, the fact that the property has been recovered by the owner in an action of replevin, or that its value has been recovered in trespass or trover, is no defense.[177] The same is true of prosecutions for assault and battery, libel, nuisance, etc.[178] This rule is changed to some extent by statute.[179]

VII. SETTLEMENT AND CONDONATION.

156. In General.—In the absence of statutory provision to the contrary, a criminal prosecution is not barred by the fact of settlement with, or condonation by, the person injured.

A person against whom a tort has been com-

---

[177] Donohoe v. State, 59 Ark. 375.

[178] See People v. Judges, 13 Johns. (N. Y.) 85; Foster v. Com., 8 Watts & S. (Pa.) 77; State v. Frost, 1 Brev. (S. C.) 385; State v. Stein, 1 Rich. (S. C.) 189; U. S. v. Buntin, 10 Fed. 730.

[179] See State v. Blyth, 1 Bay (S. C.) 166.

mitted may condone the wrong or settle with the wrongdoer, and release him from his liability. But the settlement or condonation, as between the parties, cannot, in the absence of a statute, bar a prosecution by the state to punish for the wrong and injury to the public. Unless there is some express statutory provision, nothing that is done or agreed upon between the parties after the act can take away its criminal character, or prevent the state from prosecuting and punishing the wrongdoer.[180] Thus, condonation or forgiveness by the woman does not bar a prosecution for rape or seduction.[181] An indictment for forgery will lie notwithstanding condonation or ratification by the person whose name is forged.[182] And in the case of larceny, embezzlement, and the obtaining of money or property by false pretenses, it is no defense that the property or money has been returned or repaid, or tendered back.[183]

[180] Com. v. Slattery, 147 Mass. 423, Beale's Cas. 151.

[181] Com. v. Slattery, 147 Mass. 423, Beale's Cas. 151 (rape); Barker v. Com., 90 Va. 820 (seduction).

[182] State v. Tull, 119 Mo. 421; Countee v. State (Tex. Cr. App.) 33 S. W. 127.

[183] Fleener v. State, 58 Ark. 98; Donohoe v.

Indeed, as we shall see in another chapter, it is a misdemeanor—compounding a felony—for a person against whom a felony has been committed to agree not to prosecute the offender.[184]

VIII. WRONG OF PERSON INJURED.

157. In General.—Since the state punishes for crime because of the wrong and injury to the public, and not to redress the private wrong to the individual, it is no defense, as a general rule, that the person against whom a crime has been committed was himself guilty of a crime or a private wrong in the same transaction.

Since the state does not punish crime for

State, 59 Ark. 375; State v. Frisch, 45 La. Ann. 1283; Thalheim v. State, 38 Fla. 169; State v. Pratt, 98 Mo. 482; State v. Noland, 111 Mo. 473; Dean v. State, 147 Ind. 215; Shultz v. State, 5 Tex. App. 390; Com. v. Brown, 167 Mass. 144; Robson v. State, 83 Ga. 166; Williams v. State, 105 Ga. 606; People v. De Lay, 80 Cal. 52.

The defrauded party's release of the defendant from liability is no defense on a prosecution for obtaining property by false pretenses. Com. v. Brown, 167 Mass. 144.

Ratification by the person injured is no defense on a prosecution under a statute for selling or removing property with intent to defraud any person having a lawful claim thereto. May v. State, 115 Ala. 14.

[184] Post, § 438.

the purpose of redress to the individual, but for the protection of the public, and as an example, it would seem to follow, as a matter of course, that, if a criminal act is committed, the offender cannot escape punishment on the ground that the transaction also involved a crime or a private wrong on the part of the person injured. As was said in a Colorado case, where both the prosecutor and the defendant have violated the law, it is better that both be punished than that the crime of one be used to shield the other.[185] This principle is clear, and there are a number of cases in which it has been recognized and applied. For example, it has been held that a prosecution for obtaining property by false pretenses cannot be defeated by showing that the other party committed a crime or wrong in parting with his property;[186] or that he also intended

[185] In re Cummins, 16 Colo. 451, 25 Am. St. Rep. 291.

[186] In Com. v. Henry, 22 Pa. St. 253, the indictment alleged that the defendant falsely and fraudulently represented to the prosecutor that he had a warrant for the arrest of his daughter for a misdemeanor, and threatened to arrest her, and by such means obtained money from the prosecutor. It was held that the indictment could

to defraud, or that he also made false pretenses, and thereby obtained property from the accused.[187] As was said by the Massachusetts court in such a case: "If the other party has also subjected himself to a prosecution for a like offense, he also may be punished. This would be much better than that both should escape punishment, because each deserved it equally."[188]

On the same principle, an indictment for larceny or embezzlement cannot be defeated by showing that the person from whom the

---

be maintained, notwithstanding the unlawful motive of the prosecutor in paying the money.

So, in Cummins v. People, 16 Colo. 451, 25 Am. St. Rep. 291, it was held that one who obtained property by false pretenses was none the less liable to punishment because the prosecutor parted with the money in furtherance of an illegal purpose, to obtain, by fraud, valuable lands from the United States. See, to the same effect, People v. Henssler, 48 Mich. 49; People v. Watson, 75 Mich. 582; People v. Martin, 102 Cal. 558.

[187] Reg. v. Hudson, 8 Cox, C. C. 305, Bell, C. C. 263, Beale's Cas. 158; Com. v. Morrill, 8 Cush. (Mass.) 571, Beale's Cas. 160; People v. Watson, 75 Mich. 582; People v. Shaw, 57 Mich. 403, 58 Am. Rep. 372.

[188] Com. v. Morrill, 8 Cush. (Mass.) 571, Beale's Cas. 160.

property was taken or embezzled had himself stolen it, or otherwise obtained it wrongfully or unlawfully,[189] or that he was in possession of the same, or using the same, in violation of the law.[190] An indictment for uttering counterfeit money may be sustained, though it may have been given to a prostitute.[191]

There are a few cases in which this principle has been ignored or repudiated, but they

[189] Rex. v. Beacall, 1 Car. & P. 454; Ward v. People, 3 Hill (N. Y.) 395; Com. v. Finn, 108 Mass. 466; Com. v. Smith, 129 Mass. 104.

[190] Thus, a prosecution for larceny or embezzlement of intoxicating liquors, or the proceeds of sales thereof, may be maintained, notwithstanding the liquors were kept or sold in violation of a penal statute. Com. v. Smith, 129 Mass. 104.

And an indictment will lie for stealing articles used for gambling purposes in violation of law. Bales v. State, 3 W. Va. 685. See post, § 310.

In Cunningham v. State, 61 N. J. Law, 67, it was held that, on a prosecution for procuring money by falsely pretending to have commenced a suit for the person furnishing the money, and to have expended the money in its prosecution, it is no defense that such person knew that the suit which she employed the defendant to prosecute was for a fictitious claim.

An indictment will lie for embezzlement from a foreign corporation, though it may not have complied with law relating to foreign corporations,

are clearly unsound, and are not supported by authority.[192]

IX. CONTRIBUTORY NEGLIGENCE OF PERSON INJURED.

158. In General.—Since a crime is punished because of the wrong and injury to the public, and not to redress the individual, contributory negligence on the part of the person injured by a crime is generally no defense.

In civil actions to recover damages for personal injuries or death resulting from the wrongful act or omission of another, the general rule is that there can be no recovery

---

and may have had no right to do business in the state. Com. v. Shober, 3 Pa. Super. Ct. 554.

[191] Reg. v. ———, 1 Cox, C. C. 250, Beale's Cas. 158.

[192] In New York, where an indictment charged an officer with obtaining property by false pretenses, the alleged false pretenses being that he had a warrant for the arrest of the prosecutor, it was held that, as the property was voluntarily surrendered as an inducement to an officer to violate the law,—that is, to refrain from executing a warrant,—the indictment could not be sustained. McCord v. People, 46 N. Y. 470, Beale's Cas. 162, Peckham, J., dissented. See, also, People v. Stetson, 4 Barb. (N. Y.) 151.

And in a Wisconsin case, where the charge was conspiracy on the part of several defendants to defraud the prosecutor of his money, and the evi-

if the person injured or killed was guilty of contributory negligence. This rule, however, can have little application in criminal prosecutions, where the proceeding is by the state to punish the wrongdoer for his violation of the law. On a prosecution for manslaughter by negligence, the defendant is punished because of his negligence, and to deter others, and it is no defense, therefore, that the person killed was guilty of negligence contributing to his death, even though he would not have been killed if he had used due care.[193] And on a prosecution for murder or manslaughter it is no defense that the deceased might have recovered from the injury

---

dence showed that the conspiracy was in connection with an unlawful enterprise, in which the prosecutor himself was taking part, it was held that a conviction could not be sustained. State v. Crowley, 41 Wis. 271, 22 Am. Rep. 719.

The English cases—Reg. v. Hunt, 8 Car. & P. 642, and Rex v. Stratton, 1 Camp. 549, note, Beale's Cas. 157—cited in support of this view do not support it. See the opinion of Judge Colt in Com. v. Smith, 129 Mass. 104.

[193] Reg. v. Longbottom, 3 Cox, C. C. 439; Reg. v. Swindall, 2 Car. & K. 230, Beale's Cas. 167; Belk v. People, 125 Ill. 584; Crum v. State, 64 Miss. 1, 60 Am. Rep. 44; post. § 264.

if he had submitted to a surgical operation, or used due care.[194] So, by the weight of authority, on an indictment under a statute for obtaining property by false pretenses, it is no defense that the victim was credulous and negligent, and that he would not have been cheated if he had used due care.[195]

An act may be such, however, that public policy does not require its punishment, where the injury was due largely to the negligence of the person injured. Thus, at common law it was considered that public policy did not require the punishment of persons for obtaining property by mere false representations or lies.[196]

X. CONTRIBUTORY ACTS OR NEGLIGENCE OF THIRD PERSONS.

159. In General.—If an injury is caused by the act or neglect of a person under such circumstances as to render him guilty of a crime, he is none the less responsible because of the contributing act or neglect of a third person.

This rule has frequently been applied in cases of homicide. If a person's act is a di-

---

[194] Rex v. Rew, J. Kelyng, 26, Beale's Cas. 163; Reg. v. Holland, 2 Mood. & R. 351, Beale's Cas. 164; post, § 237.

[195] Post, § 366.

[196] Post, § 351.

rect cause of another's death, he is responsible therefor, notwithstanding the wrongful act of a third person may have contributed to cause the death. If both are guilty, both should be punished. The guilt of one cannot exempt the other.[197] The same rule applies where one's neglect of duty causes another's death. He cannot escape responsibility by showing that the death was also due to neglect of duty on the part of a third person.[198] Nor, as a rule, can a man escape responsibility for another's death by showing negligence of a physician in treating the deceased.[199]

This rule does not apply where the injury or death was not due at all to the act or neglect of the accused, but solely to the intervening act of a third person.[200] And if an injury is caused by the act of one of several persons, not acting in concert, and it cannot be shown which one of them did the act,

---

[197] Reg. v. Swindall, 2 Car. & K. 230, Beale's Cas. 167; post, § 264.

[198] Reg. v. Haines, 2 Car. & K. 368, Beale's Cas. 170; post, § 265.

[199] Reg. v. Davis, 15 Cox, C. C. 174, Beale's Cas. 171; post, § 237(g)(2).

[200] Post, § 237(a).

neither can be convicted, though it is clear that one of them is guilty.[201]

XI. ENTRAPMENT.

160. In General.—That a man was entrapped in the commission of a crime is no defense—

1. **Unless the circumstances show consent on part of the person injured, and want of consent is an essential element of the crime.**
2. **Or, perhaps, unless the commission of the act was induced by active co-operation and instigation on the part of the public authorities.**

Mere Entrapment.—If a man is suspected of an intention to commit a crime, neither the individual against whom his act is to be directed nor the public authorities are bound to take steps to prevent its commission. They may set a trap for the suspect, and, if he commits the crime, and is indicted, it will ordinarily be no defense that he was entrapped.

Thus, one who steals or embezzles another's goods or money is none the less guilty because the other knew of his purpose, and left the goods or money exposed, in order to entrap

---

[201] Rex. v. Richardson, 1 Leach, C. C. 387, Beale's Cas. 166; People v. Woody, 45 Cal. 289.

and prosecute him.[202] And a man cannot escape punishment for burglary because the occupant of the house suspected his intention, and, instead of locking the door, left it unlocked, and waited with an officer to arrest him when he should enter.[203] The same is true of any other offense.[204] If, however, there is something more than mere entrapment, it may prevent the act of the suspect from being punishable.

---

[202] Rex v. Headge, 2 Leach, C. C. 1033; Reg. v. Williams, 1 Car. & K. 195; Rex v. Egginton, 2 Leach, C. C. 913, 2 East, P. C. 666, Beale's Cas. 154; Reg. v. Lawrance, 4 Cox, C. C. 438; People v. Hanselman, 76 Cal. 460, 9 Am. St. Rep. 238; State v. Covington, 2 Bailey (S. C.) 569. And see Pigg v. State, 43 Tex. 108.

The same is true of the offense of obtaining property by false pretenses. Rex v. Ady, 7 Car. & P. 140.

In People v. Hanselman, supra, the accused was held guilty of larceny from the person of another, though it appeared that the other, who was a constable, disguised himself, feigned drunkenness, and lay down in an alley for the purpose of detecting thieves, and that he was conscious of the act when the accused took the money, and remained passive, with a view to afterwards arresting and prosecuting the accused.

[203] State v. Jansen, 22 Kan. 498; Thompson v. State, 18 Ind. 386; People v. Laird, 102 Mich. 135;

161. Conduct Involving Consent.

As we have seen in a previous section,[205] if the person against whom an act is directed, which, under ordinary circumstances, would be a crime, consents to the act, and want of consent is an essential ingredient of the crime, it necessarily follows that the crime is not committed. It can make no difference, in such cases, that the consent was given merely for the purpose of entrapment, and without the knowledge of the perpetrator of the act, and that he intended to commit the crime, for, as we have seen,[206] a mere criminal intention is not punishable.

State v. Sneff, 22 Neb. 481. And see Johnson v. State, 3 Tex. App. 590.

[204] Bribery: State v. Dudoussat, 47 La. Ann. 977; People v. Liphardt, 105 Mich. 80.

The fact that a detective or other person purchases liquor from a dealer for the purpose of prosecuting him for selling in violation of law is no defense on such a prosecution. People v. Curtis, 95 Mich. 212; People v. Murphy, 93 Mich. 41.

The fact that a government inspector uses decoy letters to detect a person in mailing obscene matter is no defense. Price v. U. S., 165 U. S. 311. Compare U. S. v. Whittier, 5 Dill. 35, Fed. Cas. No. 16,688.

[205] Ante, § 150.

[206] Ante, § 117.

It follows that, if a person who suspects another of an intention to steal his property, instead of merely lying in wait to apprehend him, voluntarily delivers the property to him, and so consents to the taking, there is no larceny, for, to constitute larceny, the property must be taken without the owner's consent.[207] The same is true of robbery, which cannot be committed unless the property is taken by force or by putting in fear,[208] and of statu-

---

[207] Reg. v. Lawrance, 4 Cox, C. C. 438; Connor v. People, 18 Colo. 373, 36 Am. St. Rep. 295. And see Kemp v. State, 11 Humph. (Tenn.) 329.

In State v. Hull (Or.) 54 Pac. 159, it was held that property was taken with the consent of the owner, so that there was no larceny, where a person employed by cattle owners to catch thieves, with their consent and authority, co-operated with suspected thieves in planning the taking, and in taking, the cattle, for the purpose of having them arrested while driving the cattle away.

[208] McDaniel's Case, Fost. C. L. 121, Beale's Cas. 152; Rex v. Fuller, Russ. & R. 408; Connor v. People, 18 Colo. 373, 36 Am. St. Rep. 295. And see Reane's Case, 2 Leach, C. C. 616.

Parting with property upon the charge of an unnatural crime (post, § 375) will not make the taking robbery, if it be parted with, not from fear of loss of character, but for the purpose of prosecuting. Rex v. Fuller, supra.

tory offenses involving putting in fear or want of consent.[209] And, in the case of burglary, the offense is not committed where the occupant of the house or his servant, by his direction or authority, opens the door, and admits one whom he suspects of an intention to break and enter, or takes active steps to induce him to break and enter.[210] The effect of consent thus given upon the liability of persons as accessaries or principals in the second degree, and for attempts, is elsewhere discussed.[211]

[209] In People v. Gardiner, 25 N. Y. Supp. 1072, it was held that, as the statutory offense of extortion by threats and putting in fear cannot be committed unless the money or property is parted with under the influence of fear, it was not committed where the prosecutor handed over his property to the accused, under instructions from the police, and for the purpose of entrapment. This case was reversed by the court of appeals, but only on the ground that the defendant was guilty of an attempt. People v. Gardner, 144 N. Y. 119, 43 Am. St. Rep. 741.

[210] Rex v. Egginton, 2 Leach, C. C. 913, 2 East, P. C. 666, Beale's Cas. 154; Reg. v. Johnson, Car. & M. 218; Allen v. State, 40 Ala. 334; People v. McCord, 76 Mich. 200; Speiden v. State, 3 Tex. App. 156. See, also, People v. Collins, 53 Cal. 185.

[211] Post, §§ 171, 177; ante, § 129.

162. Instigation.

Even in the case of crimes in which want of consent is not an essential element, a person who is entrapped into committing them should not always be punished. Public sentiment, as well as the leaning of the courts, is strongly against the practice of entrapping persons into the commission of crimes by the common detective methods. The practice has frequently been condemned by the courts, and there are reported cases in which it has been held, independently of any question of consent on the part of the person injured, that a criminal act may not be punishable if the accused was induced to commit it by active co-operation and instigation on the part of public detectives.[212] A sound public policy requires that the courts shall condemn this practice by directing an acquittal whenever it appears that the public authorities, or private detectives, with their cognizance, have taken active steps to *lead* the accused into the commission of the act.[213] It is perfectly legitimate and proper, however, to adopt devices and traps for the purpose of detecting crime

[212] Saunders v. People, 38 Mich. 218; People v. McCord, 76 Mich. 200; State v. Hayes, 105 Mo. 76, 24 Am. St. Rep. 360; State v. Dudoussat, 47

and securing evidence, provided the device is not a temptation and solicitation to commit it.[214] The crime of bribery furnishes a good illustration of this distinction. If a public officer solicits a bribe of his own accord, the fact that a trap is laid and the bribe paid in the presence of concealed witnesses does not render him any the less guilty, nor is such an entrapment contrary to public policy.[215] But if a public officer, without previous solicitation on his part, is induced to accept a bribe by the active efforts and instigation of persons who wish to prosecute him, with the co-operation of the public authorities, he should

La. Ann. 977. And see O'Brien v. State, 6 Tex. App. 665, 7 Tex. App. 181.

[213] As was said by Judge Marston in a Michigan case: "Human nature is frail enough at best, and requires no encouragement in wrongdoing. If we cannot assist another, and prevent him from committing crime, we should at least abstain from any active efforts in the way of leading him into temptation." Saunders v. People, 38 Mich. 218, 222. See, also, Connor v. People, 18 Colo. 373, 36 Am. St. Rep. 295; State v. Hayes, 105 Mo. 76, 24 Am. St. Rep. 360.

[214] Ante, § 160.

[215] State v. Dudoussat, 47 La. Ann. 977; People v. Liphardt, 105 Mich. 80.

not be indicted or punished.[216] It must be conceded that this view is not supported by the weight of actual decision,[217] but the tendency of the courts is in its favor.

As far as actual authority goes, it is no doubt safe to say that the fact that a private person has led another into the commission of

---

[216] In State v. Dudoussat, supra, it was said that, on such a state of facts, the accused would be entitled to an acquittal.

And in a Texas case it was held that a person who gave an officer money to influence his conduct was not guilty of bribery, under the Texas statute, where the officer first approached him for the purpose of entrapment, and expressed a willingness to accept a bribe, and thereby instigated the giving of it. O'Brien v. State, 6 Tex. App. 665, 7 Tex. App. 181.

But see, as contra, People v. Liphardt, supra.

[217] People v. Liphardt, supra (but compare Saunders v. People, 38 Mich, 218); Pigg v. State, 43 Tex. 108; People v. McCord, 76 Mich. 200; State v. Jansen, 22 Kan. 498.

In City of Evanston v. Myers, 172 Ill. 266, it was held that a person charged with selling intoxicating liquors in violation of law could not escape liability by showing that the public authorities furnished the purchaser with money to buy the liquor.

a crime is no defense if the public authorities were not concerned in it.[218]

---

[218] People v. Murphy, 93 Mich. 41; People v. Curtis, 95 Mich. 212; Pigg v. State, 43 Tex. 108; Johnson v. State, 3 Tex. App. 590. And see the cases cited ante, § 160.

An indictment for disposing of forged bank notes will lie, notwithstanding the person to whom they were uttered was the agent of the bank, and applied to purchase them for the purpose of detection and prosecution. Rex v. Holden, Russ. & R. 154.

CHAPTER V.

PARTIES IN CRIME.

I. In General, §§ 163-165.
II. Principals in the First Degree, §§ 166-169.
III. Principals in the Second Degree, §§ 170-175.
IV. Accessaries before the Fact, §§ 176-180.
V. Accessaries after the Fact, §§ 181-185.
VI. Acts for Which Accomplices are Responsible, §§ 186-190.
VII. Persons Who may be Aiders and Abettors or Accessaries, § 191.
VIII. Countermand or Withdrawal, § 192.
IX. Principal and Agent, and Master and Servant, §§ 193-196.

I. IN GENERAL.

163. Classification of Parties.—The parties to a felony are guilty either (1) as principals or (2) as accessaries. The distinction is not recognized in treason or in misdemeanors, but all who take part in such crimes, if punishable at all, are punishable as principals.

Principals and accessaries are either—

1. Principals in the first degree,—those who actually commit the deed.
2. Principals in the second degree,—those who are present, actually or constructively, aiding or abetting the commission of the deed.

3. Accessaries before the fact,—those who procure, counsel, or command the deed, but who are absent when it is committed.
4. Accessaries after the fact,—those who receive, comfort, or assist another, knowing that he has committed a felony.

164. Offenses in Which These Distinctions are Recognized.

(*a*) *In General.*—The distinction between principals in the first and second degree is necessarily recognized in all offenses, whether they be treason, felony, or misdemeanors. But it is in felonies only, as murder, rape, robbery, larceny, etc., that any distinction is made between principals and accessaries. All concerned are guilty and punishable as principals, if guilty at all, whether present or absent, in treason,[1] and in misdemeanors, as in assaults and assault and battery, gaming, forgery and cheating at common law, keeping a gaming house or bawdy house, and other nuisances, betting at elections, etc.[2]

---

[1] 3 Inst. 138; 1 Hale, P. C. 612, 613; 2 Hawk. P. C. c. 29, § 2; 4 Bl. Comm. 35; Reg. v. Clayton, 1 Car. & K. 128, Beale's Cas. 388.

[2] 2 Hawk. P. C. c. 29, § 2; 4 Bl. Comm. 36; 1 Hale, P. C. 613; Reg. v. Clayton, 1 Car. & K. 128, Beale's Cas. 388; Stevens v. People, 67 Ill. 587; Hawkins v. State, 13 Ga. 322, 58 Am. Dec. 517; State v. Lymburn, 1 Brev. (S. C.) 397, 2 Am. Dec.

(*b*) *Statutory Offenses.*—The distinction between principals and accessaries applies to statutory felonies, as well as to felonies at common law, unless the statute shows a contrary intent.[3] And it applies to an offense which was not a felony at common law, but which has been made a felony by statute, as, in some jurisdictions, forgery, obtaining property by false pretenses, and assaults with intent to kill, to rob, to rape, etc.[4] It was said in a Kentucky case that, as a general rule, where a statute creates a felony and prescribes a particular punishment therefor, or where a statute provides a punishment for a common-law felony by name, those who were

669; Williams v. State, 12 Smedes & M. (Miss.) 58; Com. v. Gannett, 1 Allen (Mass.) 7, 79 Am. Dec. 693; People v. Erwin, 4 Denio (N. Y.) 129; Mulvey v. State, 43 Ala. 316, 94 Am. Dec. 684; Howlett v. State, 5 Yerg. (Tenn.) 144; State v. Smith, 2 Yerg. 273; Wagner v. State, 43 Neb. 1; Sanders v. State, 18 Ark. 198.

[3] 1 Hale, P. C. 613, 614; Reg. v. Tracy, 6 Mod. 30; Stamper v. Com., 7 Bush. (Ky.) 612; Com. v. Carter, 94 Ky. 527; Bland v. Com., 10 Bush. (Ky.) 622; Meister v. People, 31 Mich. 99; Nichols v. State, 35 Wis. 308; McGowan v. State, 9 Yerg. (Tenn.) 184.

[4] Nichols v. State, 35 Wis. 308.

present aiding and abetting in the commission of the crime are held to be included by the statute, although not mentioned. But where the punishment is imposed by the statute upon the person alone who actually commits the acts constituting the offense, and not in general terms upon those who are guilty of the offense, according to common-law rules, mere aiders and abettors will not be deemed to be within the act.[5] But this case has been overruled, and the rule established that, unless it is plain, from the nature of an offense made a felony by statute, that the provisions of the statute were intended to affect only the party actually committing the offense, aiders and abettors are punishable.[6]

(*c*) *Petit Larceny.*—In England there were no accessaries, either before or after the fact, in petit larceny,—i. e. larceny of property of the value of twelve pence or less,[7]—but all persons concerned therein, if guilty at all, were guilty as principals.[8] And this was

---

[5] Stamper v. Com., 7 Bush. (Ky.) 612. See, also, Bland v. Com., 10 Bush. (Ky.) 622; Frey v. Com., 83 Ky. 190.

[6] Com. v. Carter, 94 Ky. 527.

[7] Post, § 334.

[8] 2 Inst. 183; 4 Bl. Comm. 36; 1 Hale, P. C.

true notwithstanding petit larceny seems to have been regarded as a felony.[9] The same is true in this country where larceny is divided into grand and petit larceny, and the latter is a misdemeanor only,[10] or where all larceny is reduced to the grade of petit larceny.[11]

(*d*) *Homicide.*—It is clear that there may be accessaries before the fact in murder at common law, in murder in the first degree under the statutes, and in murder in the second degree.[12] But there cannot be accessaries before the fact to voluntary manslaughter, for "it is committed suddenly, without reflection, in heat of passion and without malice, express or implied, and repels the supposition that the homicide was the result of premeditation, con-

530; 1 Hawk. P. C. c. 29, §§ 1, 24.

[9] 1 Hale, P. C. 530.

[10] Ward v. People, 6 Hill (N. Y.) 144; State v. Gaston, 73 N. C. 93, 21 Am. Rep. 459. See Shay v. People, 22 N. Y. 317.

[11] In North Carolina, all larceny has been reduced by statute to the degree of petit larceny, and in that state there can be no accessaries in larceny, but all concerned are guilty as principals. State v. Gaston, 73 N. C. 93, 21 Am. Rep. 459; State v. Stroud, 95 N. C. 626.

[12] Jones v. State, 13 Tex. 168, 62 Am. Dec. 550; State v. Maloy, 44 Iowa, 104.

cert, or aid, all of which would be evidences of malice."[13] There may be principals in the second degree and accessaries before the fact to involuntary manslaughter. Thus, if two men drive separate vehicles at a furious and dangerous speed along the highway, each inciting and abetting the other, and one of them drives over and kills a person, the one thus causing the death is guilty of manslaughter as principal in the first degree, and the other is guilty as principal in the second degree. And the same would be true of two persons in the same vehicle, one driving and the other inciting and abetting him.[14] If one should incite another to so drive, and should be absent when the latter runs over and kills a person, he would be guilty of manslaughter as accessary before the fact.[15]

---

[13] Jones v. State, 13 Tex. 168, 62 Am. Dec. 550. And see 4 Bl. Comm. 36; 1 Hale, P. C. 616.

[14] Reg. v. Swindall, 2 Car. & K. 230, Beale's Cas. 167.

Where several persons went out together to shoot at a mark, and selected such a position that their shooting was negligent, and one of them accidentally killed a man, all were held guilty of manslaughter. Reg. v. Salmon, 14 Cox, C. C. 494, Beale's Cas. 189.

[15] See Reg. v. Gaylor, Dears & B. C. C. 288.

165. Prosecution and Punishment.

(*a*) *Principals in the Second Degree.*—The law recognizes no difference, as respects the punishment, between the offense of principals in the first and second degree, but regards them as equally guilty, and subject to the same punishment. In practice the distinction is so far immaterial that, on an indictment charging one as principal in the first degree, he may be convicted on evidence showing that he was present aiding and abetting, and *vice versa.*[16] And at common law a principal in the second degree may be indicted and convicted before trial of the principal in the first degree, and even after he has been acquitted,[17] though the commission of the act by the principal in the first degree must be proved in order to convict one as aiding and abetting.[18]

---

[16] 1 Archb. Crim. Pr. & Pl. 13; Fost. 350, 351; 1 Hale, P. C. 437; Com. v. Chapman, 11 Cush. (Mass.) 422; Doan v. State, 26 Ind. 495; Williams v. State, 47 Ind. 568; State v. Squaires, 2 Nev. 226.

[17] Fost. C. L. 350, 351; 1 Hale, P. C. 437; People v. Bearss, 10 Cal. 68; People v. Newberry, 20 Cal. 439; State v. Fley, 2 Brev. (S. C.) 338, 4 Am.

(*b*) *Accessaries.*—At common law an accessary before the fact is liable to the same punishment as the principal.[19] In practice, however, the distinction between the principal and the accessary is important, except where the law has been changed by statute. Thus, at common law, an indictment must charge a person correctly as principal or accessary, according to the facts. On an indictment charging one as principal there can

---

Dec. 583; State v. Crank, 2 Bailey (S. C.) 66, 23 Am. Dec. 117; State v. Ross, 29 Mo. 32; State v. Whitt, 113 N. C. 716; Williams v. State, 69 Ga. 11.

[18] Jones v. State, 64 Ga. 697; Mulligan v. Com., 84 Ky. 229.

To convict one as an aider and abettor only, the principal in the first degree must be indicted jointly with him, or else, if he is indicted alone, the indictment must disclose the name of the principal, and give a description of his acts. Mulligan v. Com., 84 Ky. 229.

When two persons are jointly indicted, one as principal in the second degree, the former may be convicted as principal in the second degree, and the latter as principal in the first degree. Benge v. Com., 92 Ky. 1. See, also, Travis v. Com., 96 Ky. 77.

[19] 4 Bl. Comm. 39; Minich v. People, 8 Colo. 440; People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

be no conviction on evidence showing that he was merely an accessary,[20] and *vice versa*.[21] This rule has been changed in some jurisdictions by statutes. But a statute merely declaring that an accessary before the fact shall be deemed a principal and punished as a principal does not change the rule. It has no reference to the manner of charging the offense, but only to the punishment. Notwithstanding such a statute, therefore, a person indicted as a principal cannot be convicted if the evidence shows that he was an accessary only.[22]

At common law an accessary cannot be tried, without his consent, until the guilt of the principal has been legally ascertained by a conviction or outlawry, unless they are tried together, and then the jury must be charged to inquire first as to the guilt of the principal,

---

[20] Reg. v. Tuckwell, Car. & M. 215; Smith v. State, 37 Ark. 274; Norton v. People, 8 Cow. (N. Y.) 137; People v. Lyon, 99 N. Y. 210; State v. Dewer, 65 N. C. 572.

[21] Rex. v. Winifred, 1 Leach, C. C. 515; Reg. v. Brown, 14 Cox, C. C. 144, Beale's Cas. 389.

[22] Smith v. State, 37 Ark. 274; People v. Campbell, 40 Cal. 129; People v. Trim, 39 Cal. 75; People v. Schwartz, 32 Cal. 160.

and, if they are satisfied of his guilt, then as to the accessary.[23] If the principal is dead, or if he is acquitted on his trial, the accessary cannot be tried.[24] In England and in most

[23] Fost. C. L. 361; Whitehead v. State, 4 Humph. (Tenn.) 278; Marshe's Case, 1 Leon. 325; Stoops v. Com., 7 Serg. & R. (Pa.) 491, 10 Am. Dec. 482; Com. v. Phillips, 16 Mass. 423, Beale's Cas. 389; Starin v. People, 45 N. Y. 333, Beale's Cas. 390; Kingsbury v. State, 37 Tex. Cr. R. 259; Com. v. Knapp, 10 Pick. (Mass.) 477, 20 Am. Dec. 534; Ogden v. State, 12 Wis. 532, 78 Am. Dec. 754; State v. Groff, 1 Murph. (N. C.) 270; Holmes v. Com., 25 Pa. St. 221. See, also, Com. v. Woodward, Thatch. C. C. (Mass.) 63; Baron v. People, 1 Park. Cr. R. (N. Y.) 246; Com. v. Andrews, 3 Mass. 126; Smith v. State, 46 Ga. 298.

If a man is indicted as accessary to two or more, and only one has been convicted, he may be arraigned, tried, and convicted as accessary to that one, but not as accessary to all. Stoops v. Com., supra; Starin v. People, supra.

[24] Marshe's Case, 1 Leon. 325; Com. v. Phillips, 16 Mass. 423, Beale's Cas. 389; State v. McDaniel, 41 Tex. 229.

Reversal of a judgment against the principal operates as a discharge of the accessary. Marshe's Case, 1 Leon. 325.

But the pardon of the principal does not discharge the accessary, for the very fact that the pardon is extended imports final conviction. Kingsbury v. State, 37 Tex. Cr. R. 259.

of our states, if not in all, these principles of the common law have been to some extent changed by statute.[25] The fact that a statute allows an accessary to be tried before conviction of the principal does not allow conviction of an accessary without proving the principal's guilt, for "no man can be accessary to a crime which has never been committed."[26] And a statute authorizing the indictment and conviction of an accessary before or after the principal is indicted and convicted does not

---

[25] Thus, in New York it is declared: "An accessary to a felony may be indicted, tried, and convicted, either in the county where he became an accessary, or in the county where the principal felony was committed, and whether the principal felon has or has not been previously convicted, or is or is not amenable to justice, and although the principal has been pardoned or otherwise discharged after conviction." Pen. Code, § 32.

See, as to the effect of the statutes, Baxter v. People, 8 Ill. 368; People v. Outeveras, 48 Cal. 19; State v. Fredericks, 85 Mo. 145; Ulmer v. State, 14 Ind. 52; State v. Ricker, 29 Me. 84; State v. York, 37 N. H. 175; Noland v. State, 19 Ohio, 131; State v. Butler, 17 Vt. 145.

[26] Buck v. Com., 107 Pa. St. 486. See, also, Tully v. Com., 11 Bush. (Ky.) 154; Self v. State, 6 Baxt. (Tenn.) 244; Hatchett v. Com., 75 Va. 925; Ogden v. State, 12 Wis. 532, 78 Am. Dec. 754.

authorize the conviction of an accessary, nor a judgment and sentence after a verdict of guilty, if the principal has been tried and acquitted.[27]

II. PRINCIPALS IN THE FIRST DEGREE.

166. Definition.—A principal in the first degree is the one who actually commits the crime, either by his own hand, or by an inanimate agency, or by an innocent human agent.[28]

167. Inanimate Agency.

Though a principal in the first degree is one who himself commits the deed, it is not at all necessary that he shall do so by his own hand, nor even that he shall be actually present at the time it is committed. A person is guilty as principal in the first degree if he commits an offense by means of an inanimate agency set in motion by him, as where he leaves poison where another may get it, or sends poison to another through the mails, or obtains money by false pretenses by using the mails.[29]

168. Innocent Human Agent.

A person is also guilty himself as the prin-

---

[27] McCarty v. State, 44 Ind. 214, 15 Am. Rep. 232. And see Benjamin v. State, 25 Fla. 675.

[28] 4 Bl. Comm. 34.

[29] Fost. C. L. 349; 4 Bl. Comm. 34; 3 Inst. 138; U. S. v. Davis, 2 Sumn. 482, Fed. Cas. No. 14,932.

cipal in the first degree, and not merely as a principal in the second degree or accessary before the fact, if he procures the commission of an offense by an innocent human agent, as by a person who is not guilty because of ignorance of fact, youth, or insanity.[30] Thus, one who causes an innocent person to take poison, or to give poison to another, and thereby causes death, is as much the principal in the first degree in the murder as if the poison had been administered by his own hand.[31]

---

[30] 4 Bl. Comm. 35; 1 Hale, P. C. 617; Reg. v. Bannen, 2 Mood. C. C. 309, Beale's Cas. 379; People v. Adams, 3 Denio (N. Y.) 190, 45 Am. Dec. 468; Adams v. People, 1 N. Y. 173; Com. v. Hill, 11 Mass. 136; People v. McMurray, 4 Park Cr. R. (N. Y.) 234; Smith v. State, 21 Tex. App. 107, 130. And see Berry v. State, 10 Ga. 511.

Larceny or receiving stolen goods by means of innocent agent. People v. McMurray, supra.

Obtaining money or property by false pretenses. Adams v. People, 1 N. Y. 173. In this case, a man in Ohio sent a letter to a person in New York, and had it presented there by an innocent agent, and thus obtained money by false pretenses. It was held that he was guilty as principal in New York, and not merely as principal or accessary in Ohio.

[31] Gore's Case, 9 Coke, 81 a, Beale's Cas. 209; Mem., J. Kelyng, 52, Beale's Cas. 377.

The same is true of one who delivers counterfeit money or a forged instrument to a child of tender years, or to an innocent adult, with instructions to utter the same, which is done,[32] and of one who procures an innocent person to sign another's name to a note by falsely representing that the person whose name is signed has authorized it.[33] This cannot be the case, however, if the person by

---

In Reg. v. Michael, 9 Car. & P. 356, 2 Mood. C. C. 120, a woman was indicted for the murder of her infant child by poison. It appeared that she purchased a bottle of laudanum, and directed the person who had the care of the child to give it a teaspoonful every night. That person did not do so, but put the bottle on the mantel piece, where another little child found it, and gave part of the contents to the prisoner's child, who soon after died. It was held that the administering of the laudanum by the child was, under all the circumstances of the case, as much, in point of law, an administering by the prisoner, as if she had herself actually administered it with her own hand. See, also, Rex v. Harley, 4 Car. & P. 369.

[32] Com. v. Hill, 11 Mass. 136; Rex v. Palmer, 2 Leach, C. C. 978; Gregory v. State, 26 Ohio St. 510, 20 Am. Rep. 774.

[33] Reg. v. Clifford, 2 Car. & K. 202; Gregory v. State, 26 Ohio St. 510, 20 Am. Rep. 774.

whose hand the deed is done is himself a guilty agent.[34]

169. Several Persons Committing Offense.

When several persons combine to commit an offense, and each actually performs some act constituting a part of the offense, all are guilty as principals, though neither may be present when the others perform their part. Thus, if several persons combine to forge an instrument, and each executes by himself a distinct part of the forgery, in pursuance of the common plan, they are all guilty of the forgery as principals, though they may not be together when the forgery is completed by one of them adding the signature.[35]

III. PRINCIPALS IN THE SECOND DEGREE.

170. Definition.—A principal in the second degree is one who is present when a felony is committed by another, and who aids or abets in its commission.[36] To constitute one a principal in the second degree—

1. There must be a guilty principal in the first degree.

---

[34] Mem., J. Kelyng, 52, Beale's Cas. 377; Wixson v. People, 5 Park. Cr. R. (N. Y.) 119; People v. Lyon, 99 N. Y. 210; People v. McMurray, 4 Park. Cr. R. (N. Y.) 234; Rex v. Soares, Russ & R. 25.

[35] Rex v. Bingley, Russ. & R. 446, Beale's Cas. 381. See Hammack v. State, 52 Ga. 397.

2. The principal in the second degree must be present when the offense is committed. But his presence may be constructive.
3. He must aid or abet the commission of the offense. Some participation is necessary, though it need not necessarily be active. Mere knowledge of the offense and mental approval is not enough.

171. Guilty Principal in the First Degree.

There cannot be a principal in the second degree unless there is a *guilty* principal in the first degree. As we have seen, one who procures the commission of a crime by an innocent agent is himself guilty as the principal in the first degree.[37] On the trial of a person indicted as a principal in the second degree, it is necessary to show the guilt of the principal in the first degree.[38]

172. Presence When the Offense is Committed.

Presence, actual or constructive, at the time the offense is committed, is necessary to render one a principal in the second degree. If a person procures or counsels the commission of a crime by another, and is absent when it

---

[36] 4 Bl. Comm. 34; 1 Hale, P. C. 615. See State v. Brown, 104 Mo. 365.

[37] Ante, § 168.

[38] Jones v. State, 64 Ga. 697; Mulligan v. Com., 84 Ky. 229.

is committed, he is merely an accessary,[39] and at common law he cannot be convicted under an indictment charging him as a principal. Thus, where a servant let a person into his master's house on an afternoon, and concealed him there all night, in order that he might commit a larceny in the house, but left the house early the next morning, and was absent when the larceny was committed, it was held that he was not a principal in the second degree, but an accessary before the fact.[40]

173. Constructive Presence.

It is not necessary, however, in order to charge one as a principal in the second degree, as distinguished from an accessary before the fact, that there shall be a strict, actual, and immediate presence at the time and place of the commission of the offense. Nor is it necessary that he shall be an eye or ear witness of the criminal act. A person is con-

---

[39] Reg. v. Tuckwell, Car. & M. 215; Rex v. Stewart, Russ. & R. 363; Norton v. People, 8 Cow. (N. Y.) 137; Com. v. Knapp, 9 Pick. (Mass.) 496, 516, 20 Am. Dec. 491, 503, Beale's Cas. 383; Smith v. State, 37 Ark. 274; Able v. Com., 5 Bush (Ky.) 698.

[40] Reg. v. Tuckwell, Car. & M. 215. Compare Rex v. Jordan, 7 Car. & P. 432.

structively present, and therefore guilty as a principal, if he is acting with the person who actually commits the deed in pursuance of a common design, and is aiding his associate, either by keeping watch or otherwise, or is so situated as to be able to aid him, with a view, known to the other, to insure success in the accomplishment of the common enterprise.[41]

---

[41] 1 Hale, P. C. 439, 462, 537; Fost. C. L. 349, 350; Rex v. Standley, Russ. & R. 305; Breese v. State, 12 Ohio St. 146, 80 Am. Dec. 340, Beale's Cas. 386; McCarty v. State, 26 Miss. 299; State v. Squaires, 2 Nev. 226; State v. Hamilton, 13 Nev. 386; McCarney v. People, 83 N. Y. 408; Mitchell v. Com., 33 Grat. (Va.) 845, 868; Com. v. Lucas, 2 Allen (Mass.) 170; Com. v. Knapp, 9 Pick. (Mass.) 496, 20 Am. Dec. 491, Beale's Cas. 383; Tate v. State, 6 Blackf. (Ind.) 110; Doan v. State, 26 Ind. 495; State v. Poynier, 36 La. Ann. 572; Earp v. State (Tex. App.) 13 S. W. 888; Dull v. Com., 25 Grat. (Va.) 965.

"If several unite in one common design to do some unlawful act, and each takes the part assigned him, though all are not actually, yet all are present in the eye of the law." Per Wright, J., in Hess v. State, 5 Ohio, 5, 22 Am. Dec. 767.

In Breese v. State, 12 Ohio St. 146, 80 Am. Dec. 340, Beale's Cas. 386, it was held that, where two or more persons conspire to break into a store in the nighttime, and steal therein, and it is agreed between them that, in order to facilitate

Thus, a person who watches near by to prevent surprise or interference while a confederate breaks and enters a house with felonious intent, or robs a man, or sets fire to a

---

the burglary, and lessen the danger of detection, one of them shall entice the owner of the store to a house a mile distant from the store, and detain him there, while the others break into the store, and remove the goods, and the parties perform their respective parts of the agreement, the person who thus entices the owner away, and detains him, is constructively present at the burglary, and guilty as a principal in the second degree.

If several act in concert to steal a man's goods, and he is induced by fraud to trust one of them, in the presence of the others, with the possession of the goods, and another of them entices him away, so that the one who has the goods may carry them away, all are guilty of the larceny. Rex v. Standley, Russ. & R. 305.

Where a person, in pursuance of a preconcerted plan, devised by himself, remains down stairs in his own house while his confederate above steals money from a lodger, and brings it down, and delivers it to him, he is a principal in the larceny. Com. v. Lucas, 2 Allen (Mass.) 170.

One of several persons acting in concert, who leads a girl's escort away, while his confederates rape the girl, is a principal in the second degree, though not actually present at the time of the rape. People v. Batterson, 50 Hun (N. Y.) 44.

building, or commits a larceny, is guilty as a principal in the second degree, though he may not be near enough to see the other commit the offense.[42]

A person may be constructively present, even though actually at a considerable distance. In a case in Nevada, A. and B. were convicted in Nye county of an assault with intent to rob a stage, which was alleged to have been committed in that county, when the evidence tended to show that A., B., and C. had entered into a conspiracy to commit the robbery, that the attempt to commit the same was actually made by B. and C. in Nye county, and that A. was at the time in Eureka county, and not within forty miles of the scene of the attempt. It appeared, however, that, acting in pursuance of the common plan, he had given the others notice of the departure of the stage from Eureka county, by building a fire on the mountain in Eureka county. Under these circumstances it was

[42] Rex v. Passey, 7 Car. & P. 282; Rex v. Gogerly, Russ. & R. 343; Mitchell v. Com., 33 Grat. (Va.) 845, 868; Doan v. State, 26 Ind. 495; McCarney v. People, 83 N. Y. 408, 38 Am. Rep. 456; State v. Squaires, 2 Nev. 226; and other cases cited in note 48, infra.

held that A. was constructively present in Nye county at the time of the attempt, and that he was guilty as a principal in the second degree in that county, and not merely as an accessary before the fact in Eureka county.[43]

Must be Near Enough to be Able to Assist.—To be constructively present within this principle, one must at least be in such a situation that he might render assistance in some manner, not necessarily physical, in the commission of the offense.[44]

---

[43] State v. Hamilton, 13 Nev. 386.

[44] Rex v. Kelly, Russ. & R. 421; Rex v. Stewart, Russ. & R. 363; Com. v. Knapp, 9 Pick. (Mass.) 496, 516, 20 Am. Dec. 491, 503, Beale's Cas. 383; Norton v. People, 8 Cow. (N. Y.) 137; State v. Valwell, 66 Vt. 558.

In Norton v. People, supra, the defendant had sent his servant to another place to steal certain property, and the servant, acting in pursuance of such directions, but in the absence of the accused, secretly removed the property. Afterwards the accused personally aided the servant in secreting the property. It was held that he could not be convicted under an indictment charging him as a principal in the larceny, since, having been absent at the time the larceny was committed by the servant, he was merely an accessary.

In the case of Rex v. Kelly, supra, it was decided that going towards a place where a larceny

174. Participation in the Offense.

To render one guilty as principal in the second degree, he must in some way participate in the commission of the offense, by aiding or abetting the actual perpetrator of the deed. Mere presence at the time the offense is committed, and acquiesence or failure to make any effort to prevent its commission, or to apprehend the offender, is not enough.[45]

---

was to be committed, in order to assist in carrying off the property, and assisting accordingly, did not make the prisoner a principal, where he was at such a distance at the time of the felonious taking as not to be able to assist in it. In this case, the prisoner went with one W. to steal horses, but stayed at a place about half a mile from where the theft was committed. W. stole two horses, and brought them to where the prisoner stood, when the two rode away with them. The prisoner was held to be an accessary, only, and not a principal.

[45] 1 Hale, P. C. 439; 2 Hawk. P. C. c. 29, § 10; Lord Mohun's Case, 12 How. St. Tr. 949; Rex v. Young, 8 Car. & P. 644; Connaughty v. State, 1 Wis. 159, 60 Am. Dec. 370; People v. Woodward, 45 Cal. 293, 13 Am. Rep. 176; Butler v. Com., 2 Duv. (Ky.) 435; Plummer v. Com., 1 Bush. (Ky.) 76; State v. Cox, 65 Mo. 29; People v. Ah Ping, 27 Cal. 489; White v. People, 81 Ill. 333; State v. Maloy, 44 Iowa, 104; State v. Hildreth, 9 Ired.

"If he be present," said Sir Matthew Hale, "and not aiding or abetting to the felony, he is neither principal nor accessary. If A. and B. be fighting, and C., a man of full age, comes by chance, and is a looker on only, and assists neither, he is not guilty of murder or homicide, as principal in the second degree, but it is a misprison, for which he shall be fined, unless he use means to apprehend the felon."[46] Mere mental approval is not enough to render one an aider and abettor.[47] It is not necessary, however, that actual physical aid shall be given. It is enough

(N. C.) 440, 51 Am. Dec. 369; Burrell v. State, 18 Tex. 713; Lawrence v. State, 68 Ga. 289; Kemp v. Com., 80 Va. 443.

[46] 1 Hale, P. C. 439.

In 2 Hawk. P. C. c. 29, § 10, it is said: "Those who, by accident, are barely present when a felony is committed, and are merely passive, and neither in any way encourage it, nor endeavor to hinder it, nor to apprehend the offenders, shall neither be adjudged principals nor accessaries; yet, if they be of full age, they are highly punishable by fine and imprisonment for their negligence, both in not endeavoring to prevent the felony, and in not endeavoring to apprehend the offender."

[47] State v. Cox, 65 Mo. 29.

to make one a principal in the second degree if he is present in concert with the actual perpetrator of the offense, for the purpose of assisting if necessary, or of watching and preventing interference or detection, or for the purpose of encouragement.[48]

175. Criminal Intent.

To be guilty as a principal in the second degree, a criminal intent is necessary. Thus, a person who enters into communication with one who is suspected of criminal acts, and apparently aids or abets him in the commission of an act, is not a principal in the second degree, if he did so, not with a criminal intent, but for the purpose of detecting the other

---

[48] 2 Hawk. P. C. c. 29, §§ 7-10; Reg. v. Young, 8 Car. & P. 644; Rex v. Passey, 7 Car. & P. 282; Brennan v. People, 15 Ill. 511; Com. v. Knapp, 9 Pick. (Mass.) 496, 20 Am. Dec. 491, Beale's Cas. 383; McCarty v. State, 26 Miss. 299; Cooper v. Johnson, 81 Mo. 483; State v. Walker, 98 Mo. 95; McCarney v. People, 83 N. Y. 408; People v. Boujet, 2 Park. Cr. R. (N. Y.) 11; Mitchell v. Com., 33 Grat. (Va.) 845, 868; Dull v. Com., 25 Grat. (Va.) 965; Doan v. State, 26 Ind. 495; State v. Squaires, 2 Nev. 226; Wilkerson v. State, 73 Ga. 799; State v. Nash, 7 Iowa, 347; Dixon v. State, 46 Neb. 298; and other cases cited in note 42, supra.

party, and disclosing his guilt for the benefit of the public. And it can make no difference in such a case whether he was a public officer or merely a private person.[49]

Specific Intent.—When a specific intent is necessary to constitute a particular crime, one cannot be a principal in the second degree to that particular offense unless he entertains such an intent, or knows that the party actually doing the act entertains such intent.[50]

IV. ACCESSARIES BEFORE THE FACT.

176. Definition.—An accessary before the fact is one who procures, commands, or counsels the commission of a felony by another, but who is not present, either actually or constructively, when the felony is committed.[51] To constitute one an accessary before the fact—

1. There must be a guilty principal in the first degree.

---

[49] State v. McKean, 36 Iowa, 343, 14 Am. Rep. 530; Wright v. State, 7 Tex. App. 545, 32 Am. Rep. 599; People v. Farrell, 30 Cal. 316; Price v. People, 109 Ill. 109; Com. v. Downing, 4 Gray (Mass.) 29; People v. Noelke, 29 Hun (N. Y.) 461. And see Rex v. Despard, 28 How. St. Tr. 346.

[50] In order to convict a person of murder in the first degree, as an aider and abettor, it must be shown that he knew or believed that the person who committed the homicide intended to kill, or that he himself acted with such intent.

2. **The accessary must be neither actually nor constructively present when the offense is committed.**
3. **There must be some participation by way of procurement, command, or counsel. Mere knowledge that the offense is to be committed, or even mental approval, is not enough.**

177. Guilty Principal in the First Degree.

The person actually committing the deed must be a guilty party, and not an innocent agent, for, as we have seen, one who procures the commission of a felony through the instrumentality of an innocent agent is himself the principal in the first degree.[52] And of course a person who commands or counsels another to commit a felony cannot be an accessary, if the other does not actually commit the felony.[53]

Savage v. State, 18 Fla. 909. And see, as to assault with intent to kill, State v. Hickam, 95 Mo. 322, 6 Am. St. Rep. 54.

See, also, Rountree v. State, 10 Tex. App. 110.

[51] 1 Hale, P. C. 615, 616; 4 Bl. Comm. 36; Fost. C. L. 125; 2 Hawk. P. C. c. 29, § 16; People v. Lyon, 99 N. Y. 210; Able v. Com., 5 Bush (Ky.) 698; Keithler v. State, 10 Smedes & M. (Miss.) 192.

[52] Ante, § 168.

[53] See Ogden v. State, 12 Wis. 532, 78 Am. Dec. 754.

178. Absence When the Offense is Committed.

To be an accessary before the fact a party must be absent at the time the deed is done.[54] As was explained in a previous section, actual or constructive presence makes one a principal in the second degree, as distinguished from an accessary.[55]

179. The Procurement, Command, or Counsel.

To render one an accessary he must have procured, commanded, or counseled the commission of the act. "And therefore," says Sir Matthew Hale, "words that sound in bare permission make not an accessary; as, if A. says he will kill J. S., and B. says, 'You may do your pleasure for me,' this makes not B. accessary."[56] The procurement, however, need not be direct. It is sufficient if it be through the agency of another; and it may be by approbation or consent to an expressed felonious design.[57] Approbation and consent

---

[54] 1 Hale, P. C. 616; 4 Bl. Comm. 36; Reg. v. Brown, 14 Cox, C. C. 144, Beale's Cas. 389; Reg. v. Tuckwell, Car. & M. 215; Norton v. People, 8 Cow. (N. Y.) 137; Williams v. State, 47 Ind. 568.

[55] Ante, § 172, and cases there cited.

[56] 1 Hale, P. C. 616.

[57] Fost. C. L. 127; 2 Hawk. P. C. c. 29, § 11; Rex v. Somerset, 2 How. St. Tr. 966, cited in Mc-

are something more than "words sounding in bare permission," of which Hale speaks in the above quotation. Bare nondisclosure or concealment of the intention of another to commit a felony is not enough.[58]

180. Criminal Intent.

To render one guilty of a crime as an accessary he must have a criminal intent. Thus, one who joins a conspiracy to commit a robbery merely for the purpose of exposing it, and honestly carries out the plan, is not an accessary before the fact to the robbery when committed by the others.[59]

V. ACCESSARIES AFTER THE FACT.

181. Definition. An accessary after the fact is one who receives, relieves, comforts, or assists another personally, with knowledge that he has committed a felony.[60] To constitute one an accessary after the fact—

Daniel's Case, 19 How. St. Tr. 804; Rex v. Cooper, 5 Car. & P. 535; Norton v. People, 8 Cow. (N. Y.) 137.

[58] 2 Hawk. P. C. c. 29, § 23; Rucker v. State, 7 Tex. App. 549.

[59] Com. v. Hollister, 157 Pa. St. 13.

[60] If a specific intent is necessary to constitute the particular offense, a person, to be an accessary, must entertain, or know that the principal enter-

1. A felony must have been committed, and it must have been complete at the time of the relief or assistance.
2. The accused must know that the felony has been committed by the person received, relieved, or assisted.
3. The assistance must be rendered to the felon personally.

182. The Commission of the Felony.

To render one an accessary after the fact to a felony, it is clear that the person relieved or assisted must have committed a felony. It is also necessary that the felony shall have been *completed* at the time the relief or assistance was given. Thus, a person cannot be convicted as an accessary after the fact to a murder because he assisted the murderer to escape, where the assistance was rendered after the mortal wound was given, but before death ensued, as a murder is not complete until the death results.[61] In such a

tains, that specific intent. See State v. Hickam, 95 Mo. 322, 6 Am. St. Rep. 54.

[60] 4 Bl. Comm. 37; 1 Hale, P. C. 618; Wren v. Com., 26 Grat. (Va.) 952; Loyd v. State, 42 Ga. 221; Tully v. Com., 11 Bush (Ky.) 154.

[61] 4 Bl. Comm. 38; 1 Hale, P. C. 622; Harrel v. State, 39 Miss. 702, 80 Am. Dec. 95. See, also, Wren v. Com., 26 Grat. (Va.) 952.

case, however, there may be a conviction as accessary after the fact to the offense of assault with intent to murder, if this is made a felony by statute.[62] A felony must have been actually committed by the person received or assisted. It is not enough to show that he was accused of a felony.[63]

183. Knowledge of Commission of the Felony.

It is also necessary to show that the accused knew that the felony had been committed, and that it had been committed by the person received or assisted.[64] "There can be no accessary in receipt of a felon, unless he know him to have committed a felony."[65]

184. The Relief or Assistance.

To render one an accessary after the fact, some relief or assistance must be given the felon. Mere failure to disclose the commission of a felony or to apprehend the felon, or mere approval of the felony, is not enough.[66]

---

[62] Harrel v. State, supra.

[63] Poston v. State, 12 Tex. App. 408.

[64] 2 Hawk. P. C. c. 29, § 32; State v. Davis, 14 R. I. 281; Wren v. Com., 26 Grat. (Va.) 952; Loyd v. State, 42 Ga. 221; Robbins v. State, 33 Tex. Cr. R. 573.

[65] 1 Hale, P. C. 622. See Tully v. Com., 13 Bush (Ky.) 142.

[66] 1 Hale, P. C. 618; Wren v. Com., 26 Grat.

It is also necessary that the relief or assistance shall be given to the felon *personally*. For this reason receiving stolen goods from the thief, or aiding in the concealment of stolen goods, knowing that they have been stolen, does not render one an accessary after the fact to the larceny, though it is in itself an offense, for this is merely dealing with the goods, and not assisting the thief personally.[67]

Generally speaking, any assistance whatever given to a felon, to hinder his being apprehended, tried, or suffering punishment, makes the person assisting an accessary, as furnishing him with a horse to escape his pursuers, money or food to support him, a house or other shelter to conceal him, or open force or violence to rescue or protect him.[68]

(Va.) 952; Carroll v. State, 45 Ark. 539; State v. Hann, 40 N. J. Law, 228; Cooper v. Johnson, 81 Mo. 483.

[67] 4 Bl. Comm. 38; 1 Hale, P. C. 619, 620; Loyd v. State, 42 Ga. 221; Wren v. Com., 26 Grat. (Va.) 952; post, § 380. He is not an accessary because "he receives the goods only, and not the felon." 4 Bl. Comm. 38. See, also, Reg. v. Chapple, 9 Car. & P. 355.

[68] 4 Bl. Comm. 37; 2 Hawk. P. C. c. 29, §§ 26,

To convey instruments to a felon to enable him to break jail, or to bribe the jailer to let him escape, will make one an accessary.[69] "But to relieve a felon in jail with clothes or other necessaries is no offense; for the crime imputable to this species of accessary is the hindrance of public justice, by assisting the felon to escape."[70] Compounding a felony,—agreeing to conceal a felony, or not to prosecute therefor, or to withhold evidence,—without rendering any assistance to the felon, as explained above, does not render one an accessary.[71]

185. Persons Occupying Particular Relations.

"So strict is the law," says Blackstone, "that the nearest relations are not suffered to aid or receive one another. If the parent assists his child, or the child the parent, if the brother receives the brother, the master his servant, or the servant his master, or even if the husband relieves his wife, who may have any of them committed a felony,

---

27, 34, 35; 1 Hale, P. C. 619; Wren v. Com., 26 Grat. (Va.) 952; Rex v. Lee, 6 Car. & P. 536.

[69] 4 Bl. Comm. 38; 1 Hale, P. C. 621; Wren v. Com., 26 Grat. (Va.) 952.

[70] 4 Bl. Comm. 38. And see 1 Hale, P. C. 620.

[71] Wren v. Com., 26 Grat. (Va.) 952.

the receivers become accessaries."[72] But a *feme covert* cannot become an accessary by the receipt and concealment of her husband, "for she is presumed to act under his coercion, and therefore she is not bound, neither ought she, to discover her lord."[73]

VI. ACTS FOR WHICH ACCOMPLICES ARE RESPONSIBLE.

186. In General.—As a general rule, no one can be punished as an aider or abettor, or as an accessary before the fact, for a crime, to the commission of which he has never expressly or impliedly given his consent.

But if a person joins in an attempt to commit one crime, by aiding, abetting, counseling, or commanding its commission, he is to be considered as assenting to any crime which is committed by his associates in the attempt to execute the common purpose, and which is a natural or probable consequence of such attempt.

To render one guilty of a crime as a principal in the second degree or accessary before the fact, the act must constitute a crime on the part of the person committing it. There must be a guilty principal in the first degree.

---

[72] 4 Bl. Comm. 38; 3 Inst. 108; 2 Hawk. P. C. 320; 1 Hale, P. C. 621; People v. Dunn, 7 N. Y. Cr. R. 187. In several states this has been changed by statute.

[73] 4 Bl. Comm. 39; 1 Hale, P. C. 621.

187. Acts for Which Accomplice Is not Responsible.

As stated above, it may be laid down as an undoubted general proposition that no man can be properly convicted of a crime as principal in the second degree or accessary before the fact if he never expressly or impliedly consented to the commission of the crime.[74] It is not always enough to show that he counseled, commanded, or consented to some other crime. If several persons combine or conspire to commit one crime, and one of them goes outside of the common purpose and commits another crime, which is not a natural or probable consequence of carrying out the common purpose, the others are not responsible.[75] "If A. command or counsel B. to com-

---

[74] Per Mulkey, J., in Lamb v. People, 96 Ill. 73, 82. And see State v. Maloy, 44 Iowa, 104.

Persons who attend one on a lawful expedition, during which he alone commits a crime are liable therefor only on proof of a conspiracy, or of their intention to aid him in any unlawful act he might do. Hairston v. State, 54 Miss. 689, 28 Am. Rep. 392.

[75] State v. Lucas, 55 Iowa, 321, Beale's Cas. 396; Lamb v. People, 96 Ill. 73; People v. Knapp, 26 Mich. 112; Jordan v. State, 81 Ala. 20; Fraunk v. State, 27 Ala. 37; Mercersmith v. State, 8 Tex.

mit felony of one kind, and B. commits a felony of another kind, A. is not accessary; as, if A. command B. to steal a plate, and B. commits burglary to steal a plate, A. is accessary to the theft, but not to the bur-

---

App. 211; Watts v. State, 5 W. Va. 532; People v. Leith, 52 Cal. 251; State v. Hickam, 95 Mo. 322, 6 Am. St. Rep. 54; Alston v. State, 109 Ala. 51; Woolweaver v. State, 50 Ohio St. 277, 40 Am. St. Rep. 667.

Where two brothers were jointly indicted and tried for murder, and it was shown that one fired the fatal shot, while the other cut the deceased with a knife, while running by him towards the one who had the pistol, it was held that the one who cut with the knife could not be convicted as aiding and abetting his brother, unless there was preconcert of purpose between them, or unless he aided and abetted his brother, having knowledge of the other's purpose. Jordan v. State, 81 Ala. 20.

"The rule of criminal responsibility, in cases of conspiracy or combination, seems to be that each is responsible for everything done by his confederates which follows incidentally in the execution of the common design, as one of the probable and natural consequences, even though it was not intended as a part of the original design or common plan. In other words, the act must be the ordinary and probable effect of the wrongful act specifically agreed on, so that the connection between them may be reasonably apparent, and not

glary."[76] If several combine to steal from a safe in a building, and one of them, in the absence of the others, robs a watchman in the building, the others are not accessaries to the robbery.[77]

188. Acts for Which Accomplice is Responsible.

It is not always necessary, however, to render one guilty of a crime as a principal in the second degree or accessary before the fact, that he shall have *contemplated* or *expressly* assented to the commission of the particular crime. The general rule is that, if several persons combine or conspire to commit a crime, or if persons command or counsel a crime, or aid and abet in an attempt to commit a crime, or if several engage in an unlaw-

---

a fresh and independent product of the mind of one of the confederates, outside of, or foreign to, the common design. Nor must it have been committed by one of the confederates after the explosion of the plot, or the abandonment of the common design, or from causes having no connection with the common object of the conspirators." Williams v. State, 81 Ala. 1. See, also, McLeroy v. State (Ala.) 25 South. 247.

[76] 1 Hale, P. C. 616, 617. "If A. commands B. to take C., and B. takes C., and robs him, A. is not accessary to the robbery." 1 Hale, P. C. 617.

[77] State v. Lucas, 55 Iowa, 321, Beale's Cas. 396,

ful enterprise, each is responsible as principal in the second degree or accessary before the fact, according to the circumstances, for all acts committed by the others in the execution of the common purpose, if such acts are a natural or probable consequence of the unlawful combination or undertaking.[78] Thus, it is said by Foster that "if A. adviseth B. to rob C., and he doth rob him, and in doing so, either upon resistance made or to conceal the fact, or upon any other motive operating at the time of the robbery, he killeth him, A. is

---

[78] Fost. C. L. 370; 1 Hale, P. C. 441; Ashton's Case, 12 Mod. 256, Beale's Cas. 392; Ruloff v. People, 45 N. Y. 213, Beale's Cas. 392; State v. Allen, 47 Conn. 121, Beale's Cas. 394; Peden v. State, 61 Miss. 268; Williams v. State, 81 Ala. 1; Brennan v. People, 15 Ill. 511; Hamilton v. People, 113 Ill. 34, 55 Am. Rep. 396; Miller v. State, 25 Wis. 384; State v. Shelledy, 8 Iowa, 478; Miller v. State, 15 Tex. App. 125; Ferguson v. State, 32 Ga. 658; State v. Johnson, 7 Or. 210.

"The general rule is familiar, that where several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates, committed in furtherance or in prosecution of the common design for which they combine." Williams v. State, 81 Ala. 1.

accessary to the murder."[79] On the same principle, if several persons combine to commit a burglary, and one of them murders the owner of the house in order to accomplish the common purpose, all are guilty of murder.[80] The same is true where a homicide is committed by one of several persons who combine to beat another.[81] And "if A. commands B.

[79] Fost. C. L. 370. And see Miller v. State, 25 Wis. 384; State v. Davis, 87 N. C. 514.

[80] Mitchell v. Com., 33 Grat. (Va.) 845. And see Hamilton v. People, 113 Ill. 34, 55 Am. Rep. 396; Ruloff v. People, 45 N. Y. 213, Beale's Cas. 392.

[81] State v. Maloy, 44 Iowa, 104.

Where five or six persons conspired together to invade a man's household, and went there armed with deadly weapons for the purpose of attacking and beating him, and, in furtherance of this common design, one of them got into a difficulty with him, and killed him, the others being present, or near at hand, it was held that all were guilty of murder, although they did not intend to kill. Williams v. State, 81 Ala. 1. See, also, Peden v. State, 61 Miss. 268.

In Miller v. State, 25 Wis. 384, the wife of the defendant, without fear or compulsion from him, agreed with him to go to the store of the deceased, and to rob it, the husband telling her, and she believing, that he did not intend to kill the deceased, but only to knock him down, so as to stun him, in order to consummate the robbery. They

to beat C., and B. beats C. so that he dies, A. is accessary, because it may be a probable consequence of his beating."[82] If a person commands or counsels another to steal from a certain person or to steal a certain article, and the other steals from some other person, or steals some other thing, the person commanding or counseling is not accessary to the larceny; but it is otherwise if one commands or counsels another to steal generally.[83] The fact that a homicide is committed by different means from those counseled or commanded does not prevent the person counseling or commanding from being an accessary.[84] But if a man commands or counsels another to kill one person, and the other kills a different person, he is not an accessary to the murder.[85]

---

went together, and the husband, in carrying out the plan, gave the deceased a fatal blow, the wife giving no intentional assistance. A charge was sustained which justified the jury, under this state of facts, in finding her guilty of murder.

[82] 1 Hale, P. C. 617. But one who merely encourages another to tie a person is not an accessary to murder committed by the latter in doing so. People v. Keefer, 65 Cal. 232.

[83] 1 Hale, P. C. 617.

[84] 1 Hale, P. C. 617; Griffith v. State, 90 Ala. 583.

[85] 1 Hale, P. C. 617.

189. Homicide or Assault in Order to Escape.

It has been held that where several persons combine to commit an offense, and a homicide or assault is committed by one of them in order to effect his escape, the others cannot be held responsible for the homicide or assault unless they consented and were privy in fact thereto;[86] but this is doubtful, and there are decisions to the contrary.[87] Certainly, if the parties contemplate and intend the doing of everything necessary to effect an escape,—and this may be inferred from the fact that all of them arm themselves, etc.,—all will be responsible for a homicide or assault committed by one, either in effecting his own escape or in rescuing a comrade.[88]

190. Acts not Criminal on the Part of the Person Committing Them.

When a person aids or abets in the commission of an act by another, or counsels or commands an act, he cannot be punished as a principal in the second degree or accessary

---

[86] People v. Knapp, 26 Mich. 112.

[87] Hamilton v. People, 113 Ill. 34, 55 Am. Rep. 396.

[88] Ruloff v. People, 45 N. Y. 213, Beale's Cas. 392.

before the fact if the other, because of the absence of a criminal intent, or for any other reason, is not guilty of any crime. And it can make no difference that he thought the other was committing a crime, for the law, as we have seen, does not punish a mere criminal intent.[89]

Cases of Entrapment.—It sometimes happens that when a person is suspected of an intention to commit a crime, a detective, or an employe of the person against whom it is thought the crime will be committed, enters into co-operation with the suspect, and commits the act himself, with a view to prosecuting him as a principal in the second degree. In such a case, if the person actually doing the act is not guilty of a crime, either because of the absence of a criminal intent on his part, or because of the consent of his employer,[90] or for any other reason, it necessarily follows that the suspect is not guilty, whatever his intent may have been.[91]

---

[89] Ante, § 116; State v. Douglass, 44 Kan. 618; State v. Hayes, 105 Mo. 76, 24 Am. St. Rep. 360.

[90] Ante, § 161.

[91] In State v. Douglass, 44 Kan. 618, a railroad detective, suspecting the defendant of a purpose

VII. PERSONS WHO MAY BE AIDERS AND ABETTORS OR ACCESSARIES.

191. In General.—Any person who is capable of committing a crime may be guilty as a principal in the second degree or accessary before or after the fact; and it can make no difference that, by reason of age, sex, condition, or class, he or she is

---

to place obstructions on the tracks, pretended to join him in the commission of the offense, and placed the obstructions on the track himself, while the defendant stood by and abetted the act. It was held that the defendant was not guilty, under a statute punishing the willful and felonious placing of an obstruction on a railroad track, though he did not know the detective's character, and believed he was committing the offense.

In State v. Hayes, 105 Mo. 76, 24 Am. St. Rep. 360, an employe of the owner of a building, suspecting the defendant of a purpose to burglarize it, entered into co-operation with him, with the owner's consent, and opened the window of the building himself, and entered, while the defendant remained on the outside, and received goods handed out to him. It was held that the defendant was not guilty of burglary. As there was no breaking and entry by the employe with felonious intent, no such breaking and entry could be imputed to the defendant.

In a California case, one P. informed the sheriff

incompetent to commit the particular crime as principal in the first degree.[92]

Illustrations.—One of the best illustrations of this rule is in the case of rape. A boy under fourteen years of age (at common law), or a woman, cannot commit rape themselves, but either may be guilty of rape as accessary before the fact or as a principal in the second degree, according to the circumstances, by counseling, aiding, or abetting in the commission of the crime by another.[93] In like manner a husband, though he cannot himself com-

---

that the defendant had requested him to enter a house in the nighttime, and steal therefrom a sum of money which he knew to be concealed there, the money to be divided between them. By advice of the sheriff, P. agreed to do so, for the purpose of entrapping the defendant, and accordingly entered the house, secured the money, marked it so that it could be identified, and, after delivering it to the defendant gave a signal, and the sheriff arrested the defendant with the money in his possession. It was held that, inasmuch as P. alone entered the building, and did so without felonious intent, there was no burglary committed, and therefore the defendant could not have been privy to a burglary. People v. Collins, 53 Cal. 185.

[92] U. S. v. Snyder, 14 Fed. 554.

[93] Reg. v. Philips, 8 Car. & P. 736; State v.

it rape upon his wife, may counsel, aid, or sist another to do so, and thus be guilty as 'incipal in the second degree or accessary.[94] The same is true of other offenses. Thus, person may be guilty as a principal in the cond degree by aiding and abetting a bankıpt to violate the bankruptcy laws,[95] or a ɜstmaster to make a false return.[96] An unarried man may be guilty of aiding and ɜetting a married man in the commission of gamy.[97] A man may be guilty of aiding ıd abetting a woman in concealing the death her bastard child, though, under the state, no one could be guilty as principal in the 'st degree except the mother.[98] And a ɔman has been held guilty for aiding and

nes, 83 N. C. 605, 35 Am. Rep. 586. And see .w v. Com., 75 Va. 885, 40 Am. Rep. 750.

[94] Lord Audley's Case, 3 How. St. Tr. 401, 12 ɔd. 384, 1 Strange, 633; State v. Comstock, 46 wa, 265. And see Com. v. Fogerty, 8 Gray Iass.) 489, 491, 69 Am. Dec. 264; Com. v. Mury, 2 Allen (Mass.) 163, 165.

[95] U. S. v. Bayer, 4 Dill. 407, Fed. Cas. No. 15,547.

[96] U. S. v. Snyder, 14 Fed. 554.

[97] Boggus v. State, 34 Ga. 275.

[98] State v. Sprague, 4 R. I. 257. But see Frey Com., 83 Ky. 190.

abetting a man who falsely personated a sailor who was entitled to an allowance of money.[99]

VIII. COUNTERMAND OR WITHDRAWAL.

192. In General. A person is not guilty of a crime as accessary or principal in the second degree because of counseling or consenting, if he repented and countermanded the other party, or withdrew, to the knowledge of the other, before the crime was committed.[100]

This rule as applied to accessaries before the fact is thus stated by Sir Matthew Hale: "If A. commands B. to kill C., but before the execution thereof A. repents, and countermands B., and yet B. proceeds in the execution thereof, A. is not accessary, for his consent continues not, and he gave timely countermand to B. But if A. had repented, yet if B. had not been actually countermanded before the fact committed, A. had been accessary."[101] If several prisoners conspire to escape from prison, and to kill any watchman who may oppose them, and in making

---

[99] Rex v. Potts, Russ. & R. 353.

[100] 1 Hale, P. C. 617, 618; Rex v. Richardson, 1 Leach, C. C. 387, Beale's Cas. 166; State v. Allen, 47 Conn. 121, Beale's Cas. 394; Pinkard v. State, 30 Ga. 757.

[101] 1 Hale, P. C. 617, 618.

the attempt one of them kills a watchman, all are guilty of murder. One of them is none the less guilty because he abandons the attempt and returns to his cell before the killing, if he does nothing by word or deed to inform his confederates of his change of purpose.[102] If his act of withdrawal is known to his confederates, however, and is such as should naturally inform them of his intention to abandon the attempt, he is not responsible merely because they misconstrue his act, and suppose that he is still acting with them.[103]

IX. PRINCIPAL AND AGENT AND MASTER AND SERVANT.

193. In General.—A principal or master is criminally responsible for criminal acts of his agent or servant expressly or impliedly authorized by him. But, unless made so by statute, as is sometimes the case, he is not responsible for unauthorized acts. Mere ratification of an authorized act does not relate back so as to render him responsible.

An agent or servant is himself responsible for criminal acts committed in the course of his employment, though directed or commanded by his principal or master.

194. Responsibility of Principal or Master.

(*a*) *Acts Directed or Authorized.*—If a

---

[102] State v. Allen, supra.

[103] State v. Allen, supra.

principal or master directs or authorizes the commission of a felony by his agent or servant, and the latter is not an innocent agent, the principal or master is an accessary before the fact, if absent when the act is committed, or, if present, as a principal in the second degree, in accordance with the rules stated in preceding sections.[104] If the agent or servant is innocent by reason of youth, insanity, or ignorance of fact, the principal or master is guilty as principal in the first degree, whether present or absent.[105] If the offense is a misdemeanor, and the agent or servant is a guilty agent, the principal or master is liable as a principal in the second degree, whether present or absent.[106] And he is the principal in the first degree if the agent or servant is innocent.[107]

---

[104] Ante, §§ 170 et seq., 176 et seq.; Hately v. State, 15 Ga. 346.

[105] Ante, § 168.

[106] Ante, § 164; Rex v. Almon, 5 Burrows, 2686; Com. v. Nichols, 10 Metc. (Mass.) 259; Stevens v. People, 67 Ill. 587 (keeping gaming house); Mulvey v. State, 43 Ala. 316, 94 Am. Dec. 684 (selling liquor); Atkins v. State, 95 Tenn. 474 (operating a gaming device).

[107] Ante, § 168.

If a husband directs his wife to sell intoxicating

) *Acts Impliedly Authorized—Consent cquiescence.*—If a principal or master s that his agent or servant intends to iit an offense, or is committing an of-, in the course of his employment, and esces, or fails to make any effort to pre-it, he is criminally responsible for the se to the same extent as if he had ex-ly commanded or authorized it.[108] Thus, responsible if he knowingly permits his ; or servant to violate a statute prohibit-nd punishing any person who shall keep ale or sell intoxicating liquors, or who sell to minors or drunkards, or who shall a bawdy house, or a gaming house, or it gaming, etc.[109] The same is true

's in violation of a statute, he is guilty of g, as principal. Mulvey v. State, 43 Ala. 316, ı. Dec. 684.

Rex v. Almon, 5 Burrows, 2686; Com. v. ls, 10 Metc. (Mass.) 259; Com. v. Stevens, ass. 291.

Britain v. State, 3 Humph. (Tenn.) 203, it ıeld that a master who caused or permitted ave to go about in public indecently naked guilty of lewdness, and indictable therefor, ıat knowledge and consent might be inferred the circumstances.

Com. v. Nichols, 10 Metc. (Mass.) 259; Com. ›vens, 155 Mass. 291.

where a bookseller knowingly permits his servant to sell libelous or obscene publications.[110]

(*c*) *Unauthorized Acts.*—In a civil action, a principal or master is liable for the wrongful acts of his agents or servants in the course of their employment, even when done without his authority and contrary to his orders; but this is not generally the case when it is sought to hold a man criminally responsible for the act of his agent or servant. Certainly at common law, and generally under statutes as well, a man is not indictable for the criminal act of his agent or servant, though committed in the course of his employment, unless the act was committed by his direction, or unless he knew of it and acquiesced in it, for, as we have seen, the general rule is that a criminal intent is necessary to render one guilty of a crime.[111] A jailer would be responsible for

---

[110] Rex v. Almon, 5 Burrows, 2686.

[111] Rex v. Huggins, 2 Ld. Raym. 1574; People v. Parks, 49 Mich. 333, Beale's Cas. 376; State v. Bacon, 40 Vt. 456; Com. v. Nichols, 10 Metc. (Mass.) 259; Com. v. Briant, 142 Mass. 463; Com. v. Stevens, 153 Mass. 421; State v. Dawson, 2 Bay (S. C.) 360; State v. Smith, 10 R. I. 258; and other cases specifically cited in the notes following.

the death of a prisoner caused by his knowingly confining him, against his will, in an unwholesome and dangerous room; and his responsibility would be the same if he should consent to his deputy's so confining a prisoner.[112] But he would not be responsible for such an act of the deputy without his consent or knowledge, at least in the absence of negligence.[113] The same principle has been applied by most courts, though not by all, to statutory offenses by an agent or servant, as the unlawful sale or keeping for sale of intoxicating liquors or adulterated milk or food, etc.,[114] and the purchase of corn, etc., from a slave not having a ticket or permit to deal

---

[112] Rex v. Huggins, 2 Ld. Raym. 1574.

[113] Rex v. Huggins, supra.

[114] People v. Parks, 49 Mich. 333, Beale's Cas. 376; Com. v. Nichols, 10 Metc. (Mass.) 259; Com. v. Putnam, 4 Gray (Mass.) 16; Com. v. Wachendorf, 141 Mass. 270; Com. v. Stevens, 155 Mass. 291; Com. v. Stevens, 153 Mass. 421; Com. v. Hayes, 145 Mass. 289; Hipp v. State, 5 Blackf. (Ind.) 149; Lauer v. State, 24 Ind. 131; Hanson v. State, 43 Ind. 550; O'Leary v. State, 44 Ind. 91; Thompson v. State, 45 Ind. 495; State v. Baker, 71 Mo. 475; State v. Heckler, 81 Mo. 417; State v. Shortell, 93 Mo. 123; State v. McCance, 110 Mo. 398 (overruling State v. McGin-

therein.[115] And it has been held that a coal dealer who sends an experienced teamster to deliver a load of coal is not criminally responsible if the latter, without his knowledge, consent, or authority, drives upon and obstructs a sidewalk.[116]

Dissent or prohibition by a principal or master must be *bona fide,* in order to constitute a defense, when it is sought to hold him responsible for the acts of his agent or servant. If it is merely colorable, it can have no effect whatever, however publicly or frequently repeated. The question of authority or consent is to be determined by the real understanding between them, and is a question of fact for the jury.[117]

(*d*) *Negligence of Principal or Master.*—

---

nis, 38 Mo. App. 15); Anderson v. State, 22 Ohio St. 305; State v. Smith, 10 R. I. 258; Barnes v. State, 19 Conn. 398; State v. Wentworth, 65 Me. 234; State v. Hayes, 67 Iowa, 27; State v. Galocchio, 9 Tex. App. 387. For cases in which the contrary has been held, see note 127, infra.

115 State v. Dawson, 2 Bay (S. C.) 360.

116 State v. Bacon, 40 Vt. 456.

117 Com. v. Nichols, 10 Metc. (Mass.) 259; Anderson v. State, 22 Ohio St. 305; State v. Wentworth. 65 Me. 234.

When it is said that a principal is not generally indictable for the acts of his agent done without his authority or consent, it is assumed that he has used due care. He will be liable for his agent's acts to the same extent as if they were authorized by him, if they are due to want of proper care and oversight on his part, or other negligence in reference to the business which he has intrusted to the agent, for moral guilt or delinquency is imputable to him in case he fails to use proper care.[118]

(*c*) *Libel.*—Where a libelous publication was sold in a bookseller's shop, or a libel published in a newspaper, by a servant of the proprietor, it was held by the earlier English cases that the proprietor was *prima facie* responsible, but he was permitted to show that he was not privy nor assenting to nor encouraging the publication, and thus escape re-

---

[118] Com. v. Morgan, 107 Mass. 199. And see Reg. v. Holbrook, 3 Q. B. Div. 60, 4 Q. B. Div. 42.

In Rex v. Dixon, 3 Maule & S. 11, the defendant was convicted of selling unwholesome bread, upon proof that his foreman had, by mistake, put too much alum in it. There was no evidence that the master knew of the quantity used in this instance. But Bayley, J., said: "If a person employed a

sponsibility.[119] Afterwards evidence of the publication by the servant was held conclusive upon the master, and he was not allowed to show his innocence, upon the ground that this was necessary to prevent the escape of the real offender behind an irresponsible party.[120] A statute, however, has since been enacted permitting the master to show that the publication was without his authority, consent, or knowledge, and was not due to want of due care and caution on his part.[121] In this country it has been held, independently of any statute, that the master is not responsible for the publication, unless he authorized it or knew of it, or unless it was due to want of proper care and oversight, or other negligence, in reference to the business intrusted

---

servant to use alum, or any other ingredient, the unrestricted use of which was noxious, and did not restrain him in the use of it, such person would be answerable if the servant used it to excess, because he did not apply the proper precaution against its misuse."

[119] Rex v. Almon, 5 Burrows, 2686.

[120] Rex v. Gutch, Mood. & M. 433; Rex v. Walter. 3 Esp. 21.

[121] See, as to this statute. Reg. v. Holbrook, 3 Q. B. Div. 60, 4 Q. B. Div. 42.

to the servant, in which case he is responsible.[122]

(*f*) *Nuisance.*—An exception to the general rule has been made in the case of nuisance. It seems that the proprietor of works carried on for his profit by agents is liable to indictment for a public nuisance caused by acts of his agents in carrying on the works, though done by them, not only without his knowledge, but contrary to his general orders.[123]

(*g*) *Statutes Dispensing with Authority or Knowledge.*—As was shown in a previous chapter, the legislature may, on grounds of public policy, dispense with the necessity for a criminal intent, and punish a man for acts done or permitted by him without regard to his mental attitude.[124] And there are statutes in some states which have been construed by the courts as intended to render a principal or master liable criminally for his agent's or servant's commission of the offense prohibited and punished, though the agent or servant may have acted not only without his au-

[122] Com. v. Morgan, 107 Mass. 199.

[123] Reg. v. Stephens, L. R. 1 Q. B. 702.

[124] Ante, §§ 56, 70.

thority or knowledge, but even contrary to his orders.[125] Some courts, for example, have thus construed statutes requiring saloonkeepers to keep their saloons closed on Sundays,[126] and statutes prohibiting and punishing the sale of intoxicating liquors, or their sale to minors or drunkards.[127]

(*h*) *Presumption of Authority.*—In most jurisdictions, perhaps, in which it is held that a principal or master is not answerable for the criminal acts of his agent or servant in the course of his employment, it is held—at least if the act is of such a character that, if not criminal, it would be within the scope of the agent's or servant's authority, as in the case of a sale of a libelous publication in a bookseller's shop, or an unlawful sale of liquors in a saloon —that the state makes out a *prima facie* case against the principal or

---

[125] See People v. Roby, 52 Mich. 577, 50 Am. Rep. 270,

[126] People v. Roby, 52 Mich. 577, 50 Am. Rep. 270.

[127] Noecker v. People, 91 Ill. 494; McCutcheon v. People, 69 Ill. 601; Whitton v. State, 37 Miss. 379; Robinson v. State, 38 Ark. 641; Edgar v. State, 45 Ark. 356; Loeb v. State, 75 Ga. 258. For decisions to the contrary, see note 114, supra.

master by proof of the agent's or servant's act, and it is for the former to rebut the presumption of authority by proof that the act was without his authority or knowledge.[128] This rule was laid down in the earlier Massachusetts cases,[129] but has since been repudiated. In a late case it was held that there is no presumption of authority or consent, but that the jury *may* infer authority or consent, from the agent's or servant's act.[130] Neither of these views is sound. The proper rule is that the manner in which the business is conducted and other circumstances may be such as to justify the jury in finding that the principal or master acquiesced or authorized the agent's or servant's act, but that, in order to convict, there must be some other evidence than mere proof of the relation of principal and agent

---

[128] Rex v. Almon, 5 Burrows, 2686; Anderson v. State, 22 Ohio St. 305; State v. Wentworth, 65 Me. 234; State v. McCance, 110 Mo. 398; State v. Heckler, 81 Mo. 417.

[129] Com. v. Nichols, 10 Metc. (Mass.) 259.

[130] Com. v. Briant, 142 Mass. 463. And see Com. v. Holmes, 119 Mass. 195; Com. v. Locke, 145 Mass. 401; Com. v. McNeese, 156 Mass. 232. The question is not for the court, but for the jury. Com. v. Hayes, 145 Mass. 289.

or master and servant.[131] The presumption of innocence is entitled to more weight than any presumption of authority from the mere fact of agency.

(*i*) *Ratification of Unauthorized Act.*—A principal or master does not become criminally responsible for the act of his agent or servant, committed without his knowledge or authority, by subsequently ratifying the same. He must be liable, if at all, at the time the act is done.[132] "In the law of contracts, a posterior recognition, in many cases, is equivalent to a precedent command; but it is not so in respect of crimes. The defendant is responsible for his own acts, and for the acts of others done by his express or implied command, but to crimes the maxim, "*Omnis ratihabitio retrotrahitur et mandato equiparatur,*" is inapplicable.[133]

---

[131] See State v. Smith, 10 R. I. 258; Thompson v. State, 45 Ind. 495.

[132] Morse v. State, 6 Conn. 9, Beale's Cas. 223.

[133] Hosmer, C. J., in Morse v. State, supra. In this case it was held that where an employe gave credit to a minor student of Yale College for suppers, wine, and other liquors, in violation of a statute, the employer did not become responsible criminally by reason of his subsequent ratification of the employe's act.

195. Responsibility of Agent or Servant.

It is well settled that, if an agent or servant commits a crime in the course of his employment, he is criminally responsible therefor. The fact that the act was done by authority, direction or command of his principal or master is no defense whatever, for no man can authorize another to do what he cannot lawfully do himself.[134] Thus, a person who obtains money or property from another by false pretenses, with intent to defraud, cannot escape responsibility on the ground that he was acting as the mere agent or servant of another.[135] The same is true where an agent or servant sells intoxicating liquors in violation of law,[136] or keeps a bawdy house or gaming house, operates a gaming device, or permits gaming,[137] or obstructs a highway.[138]

---

[134] Ante, § 83; Com. v. Hadley, 11 Metc. (Mass.) 66, Beale's Cas. 372; Atkins v. State, 95 Tenn. 474; Sanders v. State, 31 Tex. Cr. R. 525; Smith v. District of Columbia, 12 App. D. C. 33; Douglass v. State, 18 Ind. App. 289.

[135] State v. Chingren, 105 Iowa, 169.

[136] Com. v. Hadley, 11 Metc. (Mass.) 66, Beale's Cas. 372.

[137] Stevens v. People, 67 Ill. 587; Atkins v. State, 95 Tenn. 474.

196. Partners.

Partners are agents for each other in the conduct of the partnership business, and what has been said, therefore, in the preceding sections, applies where it is sought to hold one partner criminally responsible for the act of his copartner.[139]

---

[138] Sanders v. State, 31 Tex. Cr. R. 525; Smith v. District of Columbia, 12 App. D. C. 33.

[139] See Robinson v. State, 38 Ark. 641; Whitton v. State, 37 Miss. 379.

CHAPTER VI.

OFFENSES AGAINST THE PERSONS OF INDIVIDUALS.

I. ASSAULTS AND ASSAULT AND BATTERY, §§ 197-220.
II. MAYHEM. §§ 221-223.
III. FALSE IMPRISONMENT, §§ 224-227.
IV. KIDNAPPING, §§ 228-229.
V. ABDUCTION, §§ 230-232.
VI. HOMICIDE, §§ 233-288.
A. THE HOMICIDE, §§ 233-238.
B. MURDER AT COMMON LAW, §§ 239-249.
C. SUICIDE, § 250.
D. STATUTORY DEGREES OF MURDER, §§ 251-254.
E. MANSLAUGHTER, §§ 255-265.
F. JUSTIFIABLE AND EXCUSABLE HOMICIDE, §§ 266-288.
VII. ABORTION, §§ 289-292.
VIII. RAPE, §§ 293-302.

I. ASSAULTS AND ASSAULT AND BATTERY.

197. In General.—All assaults and assault and battery are misdemeanors at common law. In some jurisdictions aggravated assaults are made felonies.

1. **An assault is an attempt or offer, with unlawful force or violence, to do a corporal hurt to another.**
2. **A battery is the actual doing of any unlawful corporal hurt, however slight, to another.**

3. Aggravated assaults, as distinguished from common or simple assault, are assaults accompanied by aggravating circumstances, as assaults with intent to kill, to do great bodily harm, to rape, to rob, etc., and assault with a deadly weapon.

To constitute an assault there must be an attempt or offer, with force and violence, to inflict unlawful corporal injury. And therefore—

1. There must be an act, and not mere menace, which, if not interrupted or diverted, will apparently result in injury.
2. There must be an actual or apparent intention to inflict injury.
3. The intent must be to inflict a corporal injury.
4. In some jurisdictions there must be a present ability to inflict the injury, while in others an apparent ability is sufficient.
5. Consent of the person against or upon whom the violence is attempted or done is a defense, if the consent is real, and if the injury is one to which he may consent, but not otherwise.
6. The violence or force attempted or done must be unlawful. And therefore it is not an assault nor an assault and battery if the force is justifiable, as where it is applied in pursuance of lawful public or domestic authority, as where an officer makes a lawful arrest or lawfully detains or controls a person in his custody, or a parent or teacher moderately corrects his child or pupil, or where it is applied in

necessary and reasonable defense of one's person or property.

198. The Act Constituting an Assault.

"An assault," says Hawkins, "is an attempt or offer, with force and violence, to do a corporal hurt to another; as, by striking at him with or without a weapon, or presenting a gun at him at such a distance to which the gun will carry, or pointing a pitchfork at him standing within reach of it, or by holding up one's fist at him, or by any other such-like act done in an angry, threatening manner."[1] In other words, an assault is an *attempt* to commit a battery. As we have seen, to constitute an attempt, there must be something more than mere intention or preparation. There must be some overt *act* done in pursuance of the intent.[2] It is well settled, therefore, that no mere threatening or abusive language can of itself amount to an assault. "Notwithstanding many ancient opinions to the contrary, it seems agreed at this day that no words whatsoever can amount to an as-

[1] 1 Hawk. P. C. c. 15, § 1, Beale's Cas. 420; State v. Davis, 1 Ired. (N. C.) 125, 35 Am. Dec. 735. And see Tarver v. State, 43 Ala. 354; People v. Lilley, 43 Mich. 521; Hays v. People, 1 Hill (N. Y.) 351.

[2] Ante, §§ 122, 123.

sault."[3] In practice it is very difficult to draw the line between violence merely menaced and an assault, and the decisions cannot all be reconciled. It was said by the North Carolina court that where an unequivocal purpose of violence is accompanied by any act which, if not stopped or diverted, will be followed by personal injury, the execution of the purpose is then begun, the battery is attempted, and there is an assault.[4] And it is safe to say that any act which will come within this statement is an assault.[5] Mere preparation is not enough, as the drawing of a weapon, without presenting it or making any

[3] 1 Hawk. P. C. c. 15, § 1, Beale's Cas. 420; People v. Yslas, 27 Cal. 630; Chapman v. State, 78 Ala. 463, 56 Am. Rep. 42; State v. Mooney, Phil. (N. C.) 434; State v. Neely, 74 N. C. 425, 21 Am. Rep. 496; People v. Lilley, 43 Mich. 521; Berkeley v. Com. 88 Va. 1017; Smith v. State, 39 Miss. 521.

This rule does not prevent the indictment as a principal of one who, by words only, incites another to commit an assault and battery. State v. Lymburn, 1 Brev. (S. C.) 397, 2 Am. Dec. 669.

[4] State v. Davis, 1 Ired. (N. C.) 125, 35 Am. Dec. 735.

[5] State v. Sims, 3 Strobh. (S. C.) 137; State v. Vannoy, 65 N. C. 532; State v. Dooley, 121 Mo. 591.

offer or attempt to use it.[6] It is otherwise if the weapon is presented.[7]

It is not necessary, in order to constitute an assault, that the assailant shall get near enough to inflict a battery. Thus, intentionally riding after a person in such a way as to compel him to retreat and seek shelter so as to avoid injury is an assault.[8] And it is an assault for a person to advance upon another in a menacing manner, with intent to strike him, though, before he is near enough to strike, he may be knocked down or stopped by the other or by a third person, or though the other may go away to escape.[9]

199. Battery.

Any unlawful injury whatsoever, however slight, actually done to the person of another, directly or indirectly, in an angry, revenge-

---

[6] Lawson v. State, 30 Ala. 14. But see People v. McMakin, 8 Cal. 547.

[7] State v. Dooley, 121 Mo. 591; Hariston v. State, 54 Miss. 689, 28 Am. Rep. 392.

Picking up a stone at a distance of twenty yards from a person, without making any offer or attempt to throw it, is not an assault. Brown v. State, 95 Ga. 481.

[8] Mortin v. Shoppee, 3 Car. & P. 373.

[9] Stephens v. Myers, 4 Car. & P. 349; People v. Yslas, 27 Cal. 630; State v. Davis, 1 Ired. (N. C.)

ful, rude, or insolent manner, is a battery.[10] Every battery includes an assault, so that on an indictment for assault and battery one may be convicted of an assault only.[11] To strike another with the fist, or with a stick or stone, to cut him with a knife, or to shoot him, are clear cases of battery. It is not necessary, however, that the injury shall be so serious as this. The least touching of another in anger, or in a rude or insolent manner, is enough, as by spitting upon him, or in any way touching him in anger, or with rudeness, even with the open hand, or jostling him out of the way, or cutting his clothes while they are on his per-

---

125, 35 Am. Dec. 735; State v. Rawles, 65 N. C. 334; State v. Vannoy, 65 N. C. 532; State v. Shipman, 81 N. C. 513; State v. Martin, 85 N. C. 508, 39 Am. Rep. 711.

In State v. Rawles, supra, where a person was at a place where he had a right to be, and four other persons, with a pitchfork, gun, etc., by following him, and using threatening and insulting language, put him in fear, and induced him to go home sooner than he would otherwise have gone, and in a different way, it was held that they were guilty of an assault.

[10] 1 Hawk. P. C. c. 15, § 2, Beale's Cas. 420.

[11] Id.

son, etc.[12] An assault and battery may be committed by taking indecent liberties with a girl or woman without her consent,[13] or by administering poison or any other deleterious drug.[14]

The force or injury need not be applied or inflicted directly.[15] An assault and battery may be committed by exposing an infant or other helpless person to the inclemency of the weather;[16] or, as was just stated, by inducing another to take poison or any other

[12] 1 Hawk. P. C. c. 15, § 2, Beale's Cas. 420; Reg. v. Cotesworth, 6 Mod. 172; Com. v. McKie, 1 Gray (Mass.) 61, 61 Am. Dec. 410; State v. Baker, 65 N. C. 332; Ridout v. State, 6 Tex. App. 249.

[13] Ridout v. State, 6 Tex. App. 249; Goodrum v. State, 60 Ga. 509.

[14] Reg. v. Button, 8 Car. & P. 660; Com. v. Stratton, 114 Mass. 303, 19 Am. Rep. 350, Beale's Cas. 451; Johnson v. State, 92 Ga. 36; Carr v. State, 135 Ind. 1. Contra, Reg. v. Dilworth, 2 Moody & R. 531; Reg. v. Hanson, 2 Car. & K. 912; Garnet v. State, 1 Tex. App. 605, 28 Am. Rep. 425.

[15] See People v. Moore, 50 Hun (N. Y.) 356, Beale's Cas. 453, where an assault was committed by stopping and turning a sleigh driven by the prosecutor.

[16] Reg. v. March, 1 Car. & K. 496. In this case, the defendants told the mother of an infant that they were going to take it to an institution to be

harmful substance in ignorance of its nature;[17] or by offering violence, and thereby causing another to jump from a window.[18]

200. Intention to Commit a Battery.

To constitute an attempt to inflict a battery, or an assault, there must be a present intent, or at least an apparent intent, to inflict a battery.[19] Menacing acts can never amount to an assault, if it appears from ac-

---

cared for, but, instead of doing so, they put it in a bag and hung it on the fence at the side of the road, and left it there. It was held that this was an assault on the child.

In Reg. v. Renshaw, 2 Cox, C. C. 285, Beale's Cas. 434, it was held that an indictment for assault can be sustained only "when the person exposed suffers a hurt or injury of some kind or other from the exposure."

[17] Com. v. Stratton, 114 Mass. 303, 19 Am. Rep. 350, Beale's Cas. 451. It was said by Wells, J., in this case: "Although force and violence are included in all definitions of assault or assault and battery, yet, where there is physical injury to another person, it is sufficient that the cause is set in motion by the defendant, or that the person is subjected to its operation by means of any act or control which the defendant exerts."

[18] Reg. v. Halliday, 61 L. T. (N. S.) 701, Beale's Cas. 427.

[19] See ante, § 121; Rex v. Gill, 1 Strange, 190;

companying words or conduct that there is no present intention to injure. For this reason it was held in an old case that a man who laid his hand on his sword and said to another, "If it were not assize time, I would not take such language from you," did not thereby commit an assault, as his words showed that there was no present intention to injure.[20] There are many other decisions to the same effect.[21]

201. Apparent Intention.

It is a controverted question whether, to constitute a criminal assault, there must be an actual present intention to inflict a battery, or whether an apparent intention is sufficient. The early English cases and authorities re-

---

Com. v. Eyre, 1 Serg. & R. (Pa.) 347; State v. Crow, 1 Ired. (N. C.) 376; Paxton v. Boyer, 67 Ill. 132, 16 Am. Rep. 615; Com. v. Mann, 116 Mass. 58.

[20] Tuberville v. Savage, 1 Mod. 3.

[21] See Com. v. Eyre, 1 Serg. & R. (Pa.) 347, where the defendant raised his hand within striking distance of the prosecutor, and said, "If it were not for your gray hairs, I would tear your heart out;" and State v. Crow, 1 Ired. (N. C.) 376, where the defendant raised his cane within striking distance, shook it at the prosecutor, and said, "If you were not an old man, I would knock you down."

quired an actual intention;[22] and this rule has been recognized by some of the English judges in later cases, and by some of the courts in this country.[23] They hold that a menacing act is not a criminal assault, if done without any intention to proceed to a battery, though the act may apparently be accompanied by such an intent, and though it may be calculated to terrify the other party and put him on the defensive, and may in fact have such effect. They do not consider the fact that the act puts the other party in fear, and tends to cause a breach of the peace, sufficient to render it criminal.

The better opinion, however, is against this view, and to the effect that if a person presents a gun at another, or threatens him with a stick or other weapon, and thereby reasonably puts him in fear and causes him to act on the defensive, or to retreat, there is an assault, whether there is any actual intention to injure or not.[24] In a comparatively late

---

[22] See 1 Russ. Crimes, 1019.

[23] State v. Blackwell, 9 Ala. 79; Tarver v. State, 43 Ala. 354; Chapman v. State, 78 Ala. 463, 56 Am. Rep. 42; White v. State, 29 Tex. App. 530.

[24] Com. v. White, 110 Mass. 407, Beale's Cas. 450. And see Kunkle v. State, 32 Ind. 220; State v.

Massachusetts case it was held that a man who pointed an unloaded gun at another was guilty of an assault, although he may have known it was not loaded, and may have had no intention to injure. "It is not the secret intent of the assaulting party," said the court, "nor the undisclosed fact of his ability or inability to commit a battery, that is material, but what his conduct and the attending circumstances denote at the time to the party assaulted. If to him they indicate an attack, he is justified in resorting to defensive action. The same rule applies to the proof necessary to sustain a criminal complaint for an assault. It is the outward demonstration that constitutes the mischief which is punished as a breach of the peace."[25]

202. Conditional Offer of Violence.

An act done towards the infliction of injury is not the less an assault because it is accompanied by a conditional threat. It is an assault to raise a stick within striking distance of another, or point a gun within shooting distance, and threaten to strike or shoot

---

Rawles, 65 N. C. 334; State v. Sims, 3 Strobh. (S. C.) 137.

[25] Com. v. White, supra.

unless the other complies with a certain demand, or forbears to do something which he has a right to do.[26] Thus, indictments for assault were sustained where a man doubled up his fist at another, and said, "If you say so again, I will knock you down;"[27] and where a man who was unlawfully driving away the prosecutor's cow, faced the prosecutor with a cocked gun in his hand, and said that if any one laid his hands on the cow he would blow his brains out.[28] These cases are clearly distinguishable from those heretofore referred to, in which language is used showing no intention to injure at all.

203. Accident.

To render one guilty of criminal assault and battery, a criminal intent, or what is equivalent thereto, is necessary. If an injury is inflicted upon another by accident in the doing of a lawful act without culpable

---

[26] U. S. v. Myers, 1 Cranch, C. C. 310, Fed. Cas. No. 15,845; State v. Morgan, 3 Ired. (N. C.) 186, 38 Am. Dec. 714; State v. Horne, 92 N. C. 805, 53 Am. Rep. 442; Hairston v. State, 54 Miss. 689, 28 Am. Rep. 392.

[27] U. S. v. Myers, 1 Cranch, C. C. 310, Fed. Cas. No. 15,845.

[28] State v. Horne, 92 N. C. 805, 53 Am. Rep. 442.

negligence, an indictment for assault and battery will not lie.[29]

204. Negligence.

A person who inflicts corporal injury upon another by culpable negligence in doing a lawful act may certainly be guilty of assault and battery for the purpose of a civil action to recover damages. It has been said that he is not liable to indictment,[30] but this is very doubtful. While there is very little authority on the question, there seems to be no good reason to doubt that a person may be guilty of criminal assault and battery if he intentionally does an act which, by reason of its wanton and grossly negligent character, exposes another to personal injury, and does in fact cause such injury.[31] Throwing a stone in sport and striking another is an assault and battery.[32]

205. Unintentional Injury in Doing Unlawful Act.

If a personal injury is unintentionally

---

[29] See Brown v. Kendall, 6 Cush. (Mass.) 292; Talmage v. Smith, 101 Mich. 370; Vincent v. Stinehour, 7 Vt. 62, 29 Am. Dec. 145.

[30] 2 Am. & Eng. Enc. Law (2d Ed.) 989.

[31] Com. v. Hawkins, 157 Mass. 551. And see the cases cited under the section following.

[32] Hill v. State, 63 Ga. 578, 36 Am. Rep. 120.

done another by one who is engaged in an unlawful act, he is not necessarily excused on the ground of accident. If the act is a crime and *malum in se,* and the injury is a natural or probable consequence of the act, he is guilty of assault and battery. Thus, if one strikes at one person and unintentionally injures another, he is guilty of assault and battery upon the person injured.[33] It is not even necessary that there shall be an intent to injure any particular person. If one throws a firecracker or shoots into a crowd, and injures any one of the crowd, it is an assault and battery.[34]

The act must be *malum in se,* and not merely *malum prohibitum.* Therefore, one who drives over another unintentionally is not guilty of a criminal assault and battery, apart from any question of negligence, mere-

[33] McGehee v. State, 62 Miss. 772, 52 Am. Rep. 209; Callahan v. State, 21 Ohio St. 306.

[34] Scott v. Shepherd, 2 W. Bl. 892, 3 Wils. 403 (the famous squib case, where a squib was thrown in the market place, and being thrown off by various persons, finally struck a person in the eye); Conway v. Reed, 66 Mo. 346, 27 Am. Rep. 354; Dunaway v. People, 110 Ill. 333, 51 Am. Rep. 686; Vandermark v. People, 47 Ill. 122; State v. Mead-

ly because he is driving at a speed prohibited by a city ordinance.[35]

206. Ability to Commit a Battery.

Whether, to constitute a criminal assault, there must be an actual present ability to inflict a battery, or whether an apparent ability is sufficient, is a question upon which the courts have differed. The cases cannot possibly be reconciled. In England some of the judges have held that a present actual ability to inflict a battery is necessary to render an assault criminal, though an apparent ability may give rise to an action for damages.[36] And this doctrine has been recognized by some of the courts in this country.[37] Thus, it has been held that aiming an unloaded gun at another, who believes it to be loaded, with-

---

ows, 18 W. Va. 658; Callahan v. State, 21 Ohio St. 306.

[35] Com. v. Adams, 114 Mass. 323, 19 Am. Rep. 362, Beale's Cas. 204.

[36] Blake v. Barnard, 9 Car. & P. 626; Reg. v. James, 1 Car. & K. 530.

[37] Chapman v. State, 78 Ala. 463, 56 Am. Rep. 42; Lawson v. State, 30 Ala. 14; State v. Sears, 86 Mo. 169; State v. Godfrey, 17 Or. 300, 11 Am. St. Rep. 830; State v. Napper, 6 Nev. 113. Compare Balkum v. State, 40 Ala 671; Mullen v. State, 45 Ala. 43, 6 Am. Rep. 691.

in the distance the gun would carry if loaded, and in such a manner as to terrify the other, is not a criminal assault.[38] This doctrine, however, has been repudiated by some of the English judges, and by most of the courts and commentators in this country, and it may be regarded as settled in most jurisdictions that a present *apparent* ability to inflict a battery is sufficient to render an assault criminal, and that actual ability is not necessary.[39] According to this view it is an assault to present a gun or pistol at another within shooting distance, though it may not be loaded, or may

[38] Chapman v. State, 78 Ala. 463, 56 Am. Rep. 42, and other cases above cited.

[39] Reg. v. St. George, 9 Car. & P. 483; Com. v. White, 110 Mass. 407, Beale's Cas. 450; Kunkle v. State, 32 Ind. 220; Crumbley v. State, 61 Ga. 582; State v. Martin, 85 N. C. 508, 39 Am. Rep. 711; State v. Shepard, 10 Iowa, 126; Keefe v. State, 19 Ark. 190; State v. Smith, 2 Humph. (Tenn.) 457; State v. Sears, 86 Mo. 169; People v. Lee Kong, 95 Cal. 666, 29 Am. St. Rep. 165, Beale's Cas. 142; ante, §§ 127, 128.

For a person to shoot at a place in the roof of a house where he supposes a policeman is concealed and watching him is an assault with intent to kill, though the policeman may be at another place on the roof. People v. Lee Kong, supra.

be loaded with powder only.[40] In Texas it was formerly held that an actual present ability to inflict the injury was necessary,[41] but this is no longer the case.[42]

The cases requiring actual ability seem to proceed upon the theory that an act does not become criminal merely because it puts another in fear, or because it tends to cause a breach of the peace;[43] but it is well settled at common law that any unjustifiable and inexcusable act is indictable if it tends directly to cause a breach of the public peace. It is on this principle that acts of malicious mischief and libels on private individuals are punished as misdemeanors at common law.[44] In some states the statutes defining and punishing assaults set the question at rest by expressly requiring actual ability to inflict a battery, and an apparent ability is not enough.[45]

---

[40] See the cases cited in the two notes preceding.

[41] Robinson v. State, 31 Tex. 170; McKay v. State, 44 Tex. 43.

[42] Kief v. State, 10 Tex. App. 286; Atterberry v. State, 33 Tex. Cr. R. 88.

[43] Chapman v. State, 78 Ala. 463, 56 Am. Rep. 42.

[44] Ante § 25; post §§ 428-429.

[45] Pratt v. State, 49 Ark. 179.

In all jurisdictions there must at least be an apparent present ability to inflict the injury. To raise a stick or present a pistol at another at such a distance that it clearly could not injure would not be an assault.[46]

207. Aggravated Assaults—In General.

An assault with intent to kill, to do great bodily harm, to rape, to rob, etc., is called an aggravated assault, as distinguished from a common assault, because the assault is aggravated by the intent. At common law aggravated assaults were punished more severely than common assault, but they were not recognized as distinct technical offenses. All assaults were merely misdemeanors. In most jurisdictions statutes have been enacted specifically punishing aggravated assaults, and in many jurisdictions they are made felonies.[47]

208. Specific Intent.

To constitute an assault with intent to

---

[46] See Reg. v. St. George, 9 Car. & P. 483; Tarver v. State, 43 Ala. 354; Howard v. State, 67 Ind. 401; Jarnigan v. State, 6 Tex. App. 465; People v. McMakin, 8 Cal. 547; ante, §§ 127, 128.

[47] See Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1; Norton v. State, 14 Tex. 387; Bowden v. State, 2 Tex. App. 56.

murder, to kill, to rob, to rape, to do great bodily harm, etc., the specific intent is essential. A person is not guilty of assault with intent to kill, for instance, unless he actually intends to kill.[48] The fact that the killing would be murder is not enough, for there may be murder without any intent to kill.[49] To constitute an assault with intent to murder, the specific intent is necessary.[50] The circumstances must be such that, if death should result, the homicide would be murder,[51] and, in addition to this, there must be the specific

---

[48] State v. Reed, 40 Vt. 603; Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1; Chrisman v. State, 54 Ark. 283, 26 Am. St. Rep. 44; Hamilton v. People, 113 Ill. 34, 55 Am. Rep. 396; and cases cited in the notes following.

It is not necessary to show that the killing would be murder. It is sufficient if it would be voluntary manslaughter. State v. Reed, supra; Hall v. State, 9 Fla. 203, 76 Am. Dec. 617; Ex parte Brown, 40 Fed. 81.

[49] Post, § 242 et seq.

[50] Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1; State v. White, 41 Iowa, 316, 20 Am. Rep. 602; Slatterly v. People, 58 N. Y. 354; Hamilton v. People, 113 Ill. 34, 55 Am. Rep. 396; Hayes v. State, 14 Tex. App. 330.

[51] Meredith v. State, 60 Ala. 441; Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1; McCormack v.

intent to murder.[52] An assault is not assault with intent to murder if the actual killing would be manslaughter only.[53]

A specific intent to rape is essential to an assault with intent to rape. To constitute rape the intercourse must, as a rule, be by force and against the will of the woman,[54] and therefore a man is not guilty of assault

---

State, 102 Ala. 156; State v. Connor, 59 Iowa, 357, 44 Am. Rep. 686; Slatterly v. People, 58 N. Y. 354; Rumsey v. People, 19 N. Y. 41; Lacefield v. State, 34 Ark. 275, 36 Am. Rep. 8; People v. Scott, 6 Mich. 287; People v. Prague, 72 Mich. 178; Hopkinson v. People, 18 Ill. 264; Beckwith v. People, 26 Ill. 500; Hamilton v. People, 113 Ill. 34, 55 Am. Rep. 396; Elliott v. State, 46 Ga. 159; Hayes v. State, 14 Tex. App. 330; Wilson v. State, 4 Tex. App. 637; State v. Nichols, 8 Conn. 496.

[52] Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1; People v. Mize, 80 Cal. 41.

One who points a pistol within shooting distance at another, who is attempting to stop his team, and threatens to shoot if he does not desist, is guilty of an assault, but not of assault with intent to murder. Hairston v. State, 54 Miss. 689, 28 Am. Rep. 392.

[53] Beckwith v. People, 26 Ill. 500; State v. Connor, 59 Iowa, 357, 44 Am. Rep. 686; People v. Prague, 72 Mich. 178; Wilson v. State, 4 Tex. App. 637; and other cases cited in note 51, supra.

[54] Post, § 293.

with intent to rape unless he intends to have connection by force and against her will.[55]

In some states the statute specifically punishes assault with intent to maim, or disable, or do great or grievous bodily harm, etc. Here, also, the specific intent is essential. In an English case a burglar was indicted under a statute for feloniously cutting and maiming a man with intent to maim and disable him. The jury found that he struck a watchman with a crowbar, and inflicted serious injuries, but that he did so with intent to produce a temporary disability until he could escape, and not a permanent disability. It was held that he could not properly be convicted.[56]

209. Assault with a Deadly Weapon.

In many states the statutes expressly punish as an aggravated assault an assault with a

---

[55] Rex v. Lloyd, 7 Car. & P. 318; Com. v. Fields, 4 Leigh (Va.) 648; Com. v. Merrill, 14 Gray (Mass.) 415, 77 Am. Dec. 336; State v. Kendall, 73 Iowa, 255, 5 Am. St. Rep. 679; Jones v. State, 90 Ala. 628, 24 Am. St. Rep. 850; Taylor v. State, 22 Tex. App. 529, 58 Am. Rep. 656; Shields v. State, 32 Tex. Cr. R. 502; State v. Massey, 86 N. C. 658, 41 Am. Rep. 478; People v. Manchego, 80 Cal. 306.

[56] Rex v. Boyce, 1 Mood. C. C. 29, Beale's Cas. 182.

deadly or dangerous weapon.[57] A deadly weapon is any weapon or instrument which is likely to cause death, when used as it is used in the particular case.[58] A weapon capable of causing death is not necessarily deadly.[59] When a weapon is clearly of such a character, or used in such a way, as to be likely to cause death, the court will take judicial notice that it is a deadly weapon, as in the case of a loaded pistol or gun,[60] an axe,[61] a hoe,[62] brass knuckles,[63] a club,[64] a sledge hammer,[65] etc. When the weapon is not clearly of such a character, whether or not it was deadly under the particular circumstances must be left to the jury as a question of fact. Thus, it

---

[57] See 2 Am. & Eng. Enc. Law (2d Ed.) 970 et seq., where the cases are collected.

[58] Pittman v. State, 25 Fla. 648; People v. Rodrigo, 69 Cal. 601.

[59] Pittman v. State, supra. But see People v. Rodrigo, supra.

[60] U. S. v. Williams, 2 Fed. 61; Hamilton v. People, 113 Ill. 34, 55 Am. Rep. 396.

[61] State v. Shields, 110 N. C. 497.

[62] Hamilton v. People, 113 Ill. 34, 55 Am. Rep. 396.

[63] Wilks v. State, 3 Tex. App. 34.

[64] State v. Phillips, 104 N. C. 786.

[65] Philpot v. Com., 86 Ky. 595.

has been held to be for the jury to say whether the statute applied to an assault with a stone,[66] a stick,[67] a horseshoe,[68] a chain,[69] a pistol used as a club,[70] a pocketknife,[71] a glass tumbler,[72] etc.

210. Ability to Commit Intended Crime.

What has been said in a previous section as to the necessity for present ability to inflict the intended injury in order to constitute an assault, and the sufficiency of present apparent ability, is applicable to aggravated assaults as well as to common assaults.[73] The question has also been considered in treating of attempts. We have seen that, by the weight of authority, a man may be guilty of an attempt to murder, or rob, etc., if there is an apparent physical ability to commit the intended murder or robbery, etc., but that it

---

[66] State v. Jarrott, 1 Ired. (N. C.) 76.

[67] State v. Dineen, 10 Minn. 407.

[68] People v. Cavanagh, 62 How. Prac. (N. Y.) 187.

[69] Kouns v. State, 3 Tex. App. 13.

[70] Prior v. State, 41 Ga. 155.

[71] Hilliard v. State, 17 Tex. App. 210; Sylvester v. State, 71 Ala. 17.

[72] Coney v. State, 2 Tex. App. 62.

[73] Ante, § 206.

is otherwise if, as a matter of law, the commission of the act as intended and attempted would not constitute a crime. Assaults with intent to murder, to rape, or to rob are attempts to commit such crimes, and therefore what has been said on this point under the head of attempts applies to such assaults.[74]

211. Lawful Force—Justification.

To constitute an assault and battery, the force threatened or applied must be unlawful. Public authority is a complete justification, provided it is not exceeded. Thus, an officer or a private individual is not guilty of an assault and battery in making a lawful arrest in a lawful manner, or in detaining a person who is lawfully in his custody, or in suppressing a riot or affray or preventing a felony.[75] He is guilty, however, if an arrest is made, or a person detained, without lawful authority, or if excessive force is employed.[76]

---

[74] Ante, §§ 127-129.

[75] Post, §§ 268-271; Com. v. Presby, 14 Gray (Mass.) 65; People v. Adler, 3 Park Cr. R. (N. Y.) 249; Patterson v. State, 91 Ala. 58; Spicer v. People, 11 Ill. App. 294; State v. Pugh, 101 N. C. 737, 9 Am. St. Rep. 44; State v. Belk, 76 N. C. 10; Mitchell v. State, 12 Ark. 50, 54 Am. Dec. 253.

[76] Com. v. Ruggles, 6 Allen (Mass.) 588; State

The same is true of domestic authority. A parent, teacher, or master is not guilty of assault and battery in moderately correcting his child, pupil, or apprentice;[77] but it is otherwise if the correction is immoderate.[78] Except in the case of master and apprentice, a

---

v. Parker, 75 N. C. 249, 22 Am. Rep. 669; State v. Belk, 76 N. C. 10; State v. Pugh, 101 N. C. 737, 9 Am. St. Rep. 44.

[77] Rex v. Keller, 2 Show. 289; Fletcher v. People, 52 Ill. 395; Johnson v. State, 2 Humph. (Tenn.) 283, 36 Am. Dec. 322; State v. Pendergrass, 2 Dev. & B. (N. C.) 365, 31 Am. Dec. 416; State v. Jones, 95 N. C. 588, 59 Am. Rep. 282; Boyd v. State, 88 Ala. 169, 16 Am. St. Rep. 31; Danenhoffer v. State, 69 Ind. 295, 35 Am. Rep. 216; Vanvactor v. State, 113 Ind. 276, 3 Am. St. Rep. 645; Com. v. Baird, 1 Ashm. (Pa.) 267; State v. Mizner, 45 Iowa, 248, 24 Am. Rep. 769; Snowden v. State, 12 Tex. App. 105, 41 Am. Rep. 667; Hutton v. State, 23 Tex. App. 386, 59 Am. Rep. 776; Dean v. State, 89 Ala. 46; Cooper v. State, 8 Baxt. (Tenn.) 324, 35 Am. Rep. 704.

A master cannot delegate authority to correct his apprentice. People v. Philips, 1 Wheeler, C. C. (N. Y.) 155.

[78] See the cases above cited. And see, particularly, Reg. v. Griffin, 11 Cox, C. C. 402; Neal v. State, 54 Ga. 281; State v. Pendergrass, 2 Dev. & B. (N. C.) 365, 31 Am. Dec. 416; Morrow v. Wood, 35 Wis. 59, 17 Am. Rep. 471; Dowlen v. State, 14 Tex. App. 61.

master has no right to chastise his servant.[79] A husband might formerly correct his wife without being guilty of assault and battery,[80] but, as a rule, this is no longer the case.[81] He may still, no doubt, use necessary force to restrain her from committing crimes or torts for which he might be liable, or from adulterous intercourse, etc.[82]

For the purpose of discipline, the superintendent of a poorhouse or reformatory may, if necessary, inflict corporal punishment or otherwise employ force, upon a pauper or prisoner, unless prevented by statute.[83] And

---

[79] Cooper v. State, 8 Baxt. (Tenn.) 324, 35 Am. Rep. 704; Davis v. State, 6 Tex. App. 133.

[80] 1 Bl. Comm. 444; State v. Black, 1 Winst. (N. C.) 266. See, also, State v. Rhodes, Phil. (N. C.) 453, 98 Am. Dec. 78.

[81] Com. v. McAfee, 108 Mass. 458, 11 Am. Rep. 383; Owen v. State, 7 Tex. App. 329; Gorman v. State, 42 Tex. 221; State v. Buckley, 2 Har. (Del.) 552; Fulgham v. State, 46 Ala. 143; State v. Oliver, 70 N. C. 60.

[82] See Bradley v. State, Walk. (Miss.) 156.

[83] See State v. Neff, 58 Ind. 516; State v. Hull, 34 Conn. 132.

Generally, a jailor has no right to inflict corporal punishment upon a prisoner, though he has the right to use all necessary force to detain him in custody. See Prewitt v. State, 51 Ala. 33.

in like manner, at common law, corporal punishment may, under some circumstances, be inflicted upon soldiers or seamen by army or naval officers,[84] or by the captain of a vessel.[85] In this country, flogging in the army and navy and on merchant vessels is expressly prohibited by act of congress.

212. Self-Defense.

When a man is assaulted, but not in such a way as to endanger his life or threaten great bodily harm, he has a right to defend himself, and, in doing so, to use any necessary force short of taking his assailant's life or inflicting great bodily harm; and, unless the force employed is clearly excessive, he is not guilty of assault and battery.[86] As will be shown

---

[84] See Wilkes v. Dinsman, 7 How. (U. S.) 89.

[85] U. S. v. Ruggles, 5 Mason, 192, Fed. Cas. No. 16,205; U. S. v. Wickham, 1 Wash. C. C. 316, Fed. Cas. No. 16,689.

[86] State v. Sherman, 16 R. I. 631; Evers v. People, 3 Hun (N. Y.) 716, 63 N. Y. 625; Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1; Agee v. State, 64 Ind. 340; Leonard v. State, 27 Tex. App. 186; State v. McNamara, 100 Mo. 100. See, also, State v. Blodgett, 50 Vt. 142; State v. Burwell, 63 N. C. 661.

For a man to spit in another's face does not justify the use by the other of a dangerous wea-

in a subsequent section, if he is assaulted in such a way as to put him in danger of death or great bodily harm, he may take his assailant's life, if necessary in order to save himself.[87] The danger need not be real. A reasonably apparent danger is sufficient.[88] There must, however, be at least a reasonable apprehension of danger.[89] The force employed in repelling an assault must not be clearly out of all proportion to the assault. One who repels a simple assault by force that is clearly excessive, and out of all proportion to the assault, is himself guilty of assault and battery.[90] As was explained in a previous

---

pon. Com. v. McKie, 1 Gray (Mass.) 61, 61 Am. Dec. 410.

[87] Post, § 275 et seq.

[88] Post, § 279; Campbell v. People, 16 Ill. 17, 61 Am. Dec. 49; Evers v. People, 3 Hun (N. Y.) 716, 63 N. Y. 625; State v. Nash, 88 N. C. 618; Christian v. State, 96 Ala. 89; People v. Lennon, 71 Mich. 298, 15 Am. St. Rep. 259; People v. Anderson, 44 Cal. 65.

[89] Post, § 279; Lawlor v. People, 74 Ill. 228; State v. Nash, 88 N. C. 618.

[90] Floyd v. State, 36 Ga. 91, 91 Am. Dec. 760; State v. Quin, 3 Brev. (S. C.) 515; Com. v. Ford, 5 Gray (Mass.) 475; Gallagher v. State, 3 Minn. 270; People v. Douglass, 87 Cal. 281.

section, mere threatening or abusive language does not amount to an assault,[91] and it will not justify or excuse an assault and battery in return.[92] One who is assaulted by another, without fault on his part, is not bound to retreat before resorting to measures of self-defense short of taking life or inflicting great bodily harm.[93] Nor is he obliged to wait until he is struck. He may prevent a battery by striking first.[94] One who is himself the aggressor, or who intentionally provokes an assault, as by the use of abusive language, cannot escape criminal responsibility for blows given him in the course of the difficulty on the ground that they were in self-defense.[95]

---

[91] Ante, § 198.

[92] State v. Martin, 30 Wis. 216, 11 Am. Rep. 567; Keiser v. State, 71 Ala. 481, 46 Am. Rep. 342; Nash v. State, 2 Tex. App. 362; Crosby v. People, 137 Ill. 325; Steffy v. People, 130 Ill. 98; State v. Rider, 90 Mo. 54.

It is otherwise in some states. See Brown v. State, 74 Ala. 42; Mitchell v. State, 41 Ga. 527.

[93] State v. Sherman, 16 R. I. 631, Beale's Cas. 341; Gallagher v. State, 3 Minn. 270.

[94] State v. McDonald, 67 Mo. 13; Gallagher v. State, 3 Minn. 270.

[95] Brown v. State, 74 Ala. 42; State v. Shields, 110 N. C. 497; People v. Miller, 49 Mich. 23; State

213. Resisting Unlawful Arrest.

An unlawful arrest is an assault and battery, and may be resisted by any necessary force short of taking life or inflicting great bodily harm. If such force only as is apparently necessary is employed, the person resisting is not guilty of assault and battery.[96] It is otherwise if the force used is clearly excessive.[97]

214. Defense of Property.

While a person cannot take another's life or inflict great bodily harm in defense of his property, except when it is necessary to prevent a felony attempted by violence or surprise,[98] he may use any force short of this that may reasonably seem to be necessary in defense of his property, real or personal.[99] If

---

v. Maguire, 69 Mo. 197; State v. Bryson, 2 Winst. (N. C.) 86; post, § 281.

[96] Alford v. State, 8 Tex. App. 545; People v. Denby, 108 Cal. 54; State v. Belk, 76 N. C. 10; State v. Hooker, 17 Vt. 658; post, § 277.

[97] Galvin v. State, 6 Cold. (Tenn.) 283. And see Com. v. Cooley, 6 Gray (Mass.) 350.

[98] Post, § 286.

[99] People v. Dann, 53 Mich. 490, 51 Am. Rep. 151; Com. v. Donahue, 148 Mass. 529, 12 Am. St. Rep. 591, Beale's Cas. 353; Roach v. People, 77 Ill. 25; People v. Flanagan, 60 Cal. 2, 44 Am. Rep.

unnecessary force is used, it is an assault and battery.[100] By the weight of authority, if a person is in peaceable possession of another's property, though his possession may be wrongful, the owner cannot resort to violence in order to regain possession, but he must resort to the machinery of the law. A man, however, may use necessary force to regain *momentarily* interrupted possession of his property, as where another wrongfully takes it in his presence, and refuses to give it back.[101]

A person may lawfully eject another from his premises, after requesting him to leave, if he has no right to remain, and he may use such force in doing so as may be reasonably necessary without being guilty of an assault

---

52; Filkins v. People, 69 N. Y. 101, 25 Am. Rep. 143.

[100] Wild's Case, 2 Lewin, C. C. 214, Beale's Cas. 347; Com. v. Goodwin, 3 Cush. (Mass.) 154; State v. Kennedy, 20 Iowa, 569; Com. v. Donahue, 148 Mass. 529, 12 Am. St. Rep. 591, Beale's Cas. 353.

[101] Com. v. Donahue, 148 Mass. 529, 12 Am. St. Rep. 591, Beale's Cas. 353. And see Rex. v. Milton, Mood. & M. 107; Com. v. Lynn, 123 Mass. 218; Com. v. Kennard, 8 Pick. (Mass.) 133; State v. Elliot, 11 N. H. 540; Anderson v. State, 6 Baxt. (Tenn.) 608.

and battery.[102] But he is guilty if he uses unnecessary force.[103]

Employes of railroad companies and other carriers are not guilty of assault and battery in ejecting trespassers, or persons violating reasonable regulations, from the cars or stations, if no unnecessary force is used.[104] The same is true of innkeepers,[105] and of a sexton ejecting a person from church.[106] If a person has entered by force, or resorts to force after entering, no request to leave is necessary before ejecting him, but it is otherwise if the entry was peaceable.[107]

---

[102] Com. v. Clark, 2 Metc. (Mass.) 23; Long v. People, 102 Ill. 331; People v. Foss, 80 Mich. 559, 20 Am. St. Rep. 532.

[103] Thus, it is an assault and battery to kick a person in ejecting him from a house. Wild's Case, 2 Lewin, C. C. 214, Beale's Cas. 347. See, also, Long v. People, 102 Ill. 331; Com. v. Dougherty, 107 Mass. 250.

[104] Com. v. Power, 7 Metc. (Mass.) 596, 41 Am. Dec. 465; State v. Overton, 24 N. J. Law, 435, 61 Am. Dec. 671; People v. Jillson, 3 Park. Cr. R. (N. Y.) 234; State v. Goold, 53 Me. 279.

[105] State v. Steele, 106 N. C. 766, 19 Am. St. Rep. 573.

[106] Com. v. Dougherty, 107 Mass. 247.

[107] State v. Burke, 82 N. C. 551; State v. Woodward, 50 N. H. 527.

An assault with intent to kill is not justifiable in defense of property merely. The law in this respect must be the same as in homicide.[108]

215. Defense of Others.

It is well settled that a parent has the right to use necessary force in defense of his child, and *vice versa.*[109] The same is true of husband and wife,[110] brothers and sisters,[111] and master and servant.[112] The circumstances, however, must be such that the person defended would have a right to use the force in his own defense. For example, he must not be the aggressor.[113] The right

---

[108] State v. Gilman, 69 Me. 163, 31 Am. Rep. 257. See post, § 286.

[109] Campbell v. Com., 88 Ky. 402, 21 Am. St. Rep. 348; Patten v. People, 18 Mich. 314, 100 Am. Dec. 173; Crowder v. State, 8 Lea (Tenn.) 669; Com v. Malone, 114 Mass. 295; post, § 288.

A father may defend his daughter against an assault by her husband. Campbell v. Com., supra.

[110] Biggs v. State, 29 Ga. 723, 76 Am. Dec. 630.

[111] State v. Melton, 102 Mo. 683.

[112] Pond v. People, 8 Mich. 150; Orton v. State, 4 G. Greene (Iowa) 140.

[113] State v. Melton, 102 Mo. 683; Crowder v. State, 8 Lea (Tenn.) 669.

to defend others is further considered in treating of homicide.[114]

216. Effect of Consent in General.

An act does not constitute an assault, or an assault and battery, if the person on or against whom it is committed freely consents to the act, provided he or she is capable of consenting, and the act is one to which consent may be given, and the consent is not obtained by fraud.[115] Thus, it has been held that a person who whips another with a switch, at his request or with his consent, is not guilty of an assault and battery.[116] The same is true of injuries received in friendly boxing matches, foot ball, and other lawful games and sports.[117] An attempt to procure an abortion by the use of

---

[114] Post, § 228. Strangers may interfere to prevent an assault or an unlawful arrest or detention. Reg. v. Tooley, 2 Ld. Raym. 1296.

[115] Reg. v. Wollaston, 12 Cox, C. C. 180; Reg. v. Clarence, 16 Cox, C. C. 511, 22 Q. B. Div. 23, Beale's Cas. 438; State v. Beck, 1 Hill (S. C.) 363, 26 Am. Dec. 190; Champer v. State, 14 Ohio St. 437; Duncan v. Com., 6 Dana (Ky.) 295.

[116] State v. Beck, 1 Hill (S. C.) 363, 26 Am. Dec. 190.

[117] Fost. C. L. 260; Reg. v. Bradshaw, 14 Cox,

instruments or drugs is not an assault upon the woman, if she consents.[118]

217. Fighting, and Breaches of the Peace.

By the decided weight of authority, a person cannot consent to a breach of the peace or to a beating which may result in serious injury. And it has been held, therefore, both in England and in this country, that if persons engage in a fight by agreement, whether a prize fight or not, their consent does not prevent each from being guilty of an assault and battery upon the other.[119] "The principle as to consent," said Stephen J., in an English case, "seems to be this: When one person is indicted for inflicting personal injury upon another, the consent of the person who sustains the injury is no

---

C. C. 83, Beale's Cas. 146; State v. Burnham, 56 Vt. 445, 48 Am. Rep. 801; Com. v. Collberg, 119 Mass. 350, 20 Am. Rep. 328, Beale's Cas. 148.

[118] State v. Cooper, 22 N. J. Law, 52, 51 Am. Dec. 248.

[119] Reg. v. Coney, 8 Q. B. Div. 534; Reg. v. Lewis, 1 Car. & K. 419; Com. v. Collberg, 119 Mass. 350, 20 Am. Rep. 328, Beale's Cas. 148; Adams v. Waggoner, 33 Ind. 531, 5 Am. Rep. 230; Willey v. Carpenter, 64 Vt. 212; State v. Newland, 27 Kan. 764; King v. State, 4 Tex. App. 54, 30 Am. Rep. 160.

defense to the person who inflicts the injury, if the injury is of such a nature, or is inflicted under such circumstances, that its infliction is injurious to the public, as well as to the person injured. The injuries given and received in prize fights are injurious to the public, both because it is against the public interest that the lives and health of the combatants should be endangered by blows, and because prize fights are disorderly exhibitions, mischievous on many grounds. Therefore, the consent of the parties to the blows which they mutually receive does not prevent those blows from being assaults."[120]

While this view is now well established, it does not seem sound, and there is at least one decision to the contrary.[121] The proper view would seem to be that the parties in such a case are not guilty of assault and battery, but merely of a breach of the peace, if of any offense, and the indictment should be for the breach of the peace.[122]

---

[120] Reg. v. Coney, 8 Q. B. Div. 534.

[121] Champer v. State, 14 Ohio St. 437. And see the dictum in State v. Beck, 1 Hill (S. C.) 363, 26 Am. Dec. 190.

[122] See Rex v. Billingham, 2 Car. & P. 234; State v. Burnham, 56 Vt. 445, 48 Am. Rep. 801.

218. Submission through Fear.

Consent must be distinguished from mere submission. Submission to an act through fear is not consent. Thus, even if it is not an assault to attempt to have connection with a child of tender years with her consent, it is otherwise if she submits under the influence of fear, or because she feels herself in the power of the man.[123]

219. Persons Incapable of Consenting.

In England it has been held that an attempt to have connection with a girl of tender years with her consent is not an assault, even though she may be too young to understand the nature of the act, and though her consent would be no defense on an indictment for rape.[124] In this country, however, the decisions are to the contrary. A child under ten years of age, or in some states

[123] Reg. v. Woodhurst, 12 Cox, C. C. 443; Reg. v. Day, 9 Car. & P. 722.

[124] Reg. v. Read, 2 Car. & K. 957; 1 Den. C. C. 377 (where the child was under nine); Reg. v. Woodhurst, 12 Cox, C. C. 443; Reg. v. Day, 9 Car. & P. 722; Reg. v. Martin, 9 Car. & P. 213; Reg. v. Johnson, Leigh & C. 632, 10 Cox, C. C. 114.

under the age of twelve, or even more, is not capable of consenting to sexual intercourse, and consent is no defense on a charge of assault with intent to rape.[125] It has even been held that, where a statute punishes as rape carnal knowledge of a female under the age of sixteen or eighteen with her consent, consent is no defense to a charge of assault with intent to rape.[126] To attempt to have intercourse with a woman who is asleep, or who is insensible through drunkenness or drugs, is an assault.[127]

---

[125] People v. McDonald, 9 Mich. 150; Com. v. Nickerson, 5 Allen (Mass.) 518; People v. Stewart, 85 Cal. 174; State v. Miller, 42 La. Ann. 1186, 21 Am. St. Rep. 418; Lawrence v. Com., 30 Grat. (Va.) 845.

In Com. v. Nickerson, 5 Allen (Mass.) 518, it was held that a child of nine years was not competent to consent to a forcible transfer of him to a stranger from the custody of his mother, and that such consent was no defense on a prosecution for assault and battery upon him in making the transfer.

[126] State v. Rollins, 8 N. H. 550; Hadden v. People, 25 N. Y. 373; Murphy v. State, 120 Ind. 115; People v. Goulette, 82 Mich. 36.

[127] Reg. v. Camplin, 1 Den. C. C. 89, 1 Cox, C. C. 220. See post, § 295.

220. Consent Induced by Fraud.

Whether consent to an act of force will prevent it from being an assault and battery, when the consent is induced by fraud, is not clear, and the decisions are conflicting. It is no doubt safe to say that if a man or woman consents to an act, understanding its nature, the consent will prevent the act from being an assault and battery, notwithstanding it is induced by fraud.[128] But where a person is induced to consent to an act of a particular nature, and the act done is of a different nature, the consent is no defense.[129] Thus, where a young woman, though of an age to be competent to consent to sexual intercourse, submitted to intercourse with a physician by whom she was being treated, but was ignorant of the nature of the act, believing in good faith, as he represented, that he was treating her professionally, it was held that he was guilty of an assault. Wilde, J., said that what the girl consented to "was something wholly different from that which was done, and there-

[128] Reg. v. Clarence, 16 Cox, C. C. 511, 22 Q. B. Div. 23, Beale's Cas. 438.

[129] Reg. v. Case, 4 Cox, C. C. 220, Beale's Cas. 435.

fore, that which was done was done without her consent."[130] If a person by fraud induces another to take a poisonous or otherwise deleterious drug, in ignorance of its nature, and injury results, the consent does not bar an indictment for assault and battery.[131].

There has been a difference of opinion as to whether a man who has intercourse with a woman with her consent, and communicates a venereal disease, is guilty of an assault because of her ignorance of the fact that he is diseased.[132] By the weight of au-

---

[130] Reg. v. Case, 4 Cox. C. C. 220, Beale's Cas. 435.

So, in Rex v. Rosinski, 1 Mood. C. C. 19, it was held that, for a physician to make a female patient strip naked, by pretending that he could not otherwise judge of her illness, and taking off her clothes himself, was an assault.

In Rex v. Nichol, Russ. & R. 130, a school master who took indecent liberties with a female scholar, without her consent, though she did not resist, was held guilty of an assault. See, also, Reg. v. Lock, L. R. 2 C. C. 10.

[131] Com. v. Stratton, 114 Mass. 303, 19 Am. Rep. 350, Beale's Cas. 451.

[132] That it was an assault was held in Reg. v. Bennett, 4 Fost. & F. 1105, and in Reg. v. Sinclair, 13 Cox, C. C. 28. But in a later case the con-

thority, a man who has intercourse with a woman with her consent by fraudulently personating her husband is not guilty of rape,[133] and, where this is the case, one who attempts to do so is not guilty of an assault with intent to rape.[134]

II. MAYHEM.

221. Definition.—Mayhem at common law is the violently depriving of a person "of the use of such of his members as may render him the less able, in fighting, either to defend himself or to annoy his adversary."[135] The offense has been extended by statute so as to include other injuries.

222. Nature of the Offense.

As this definition shows, whether or not an injury was mayhem at common law did not depend so much upon whether the injury was a serious one or not, as upon the

---

trary was held, in the case of husband and wife, by nine judges out of thirteen. Reg. v. Clarence, 16 Cox, C. C. 511, 22 Q. B. Div. 23, Beale's Cas. 438.

[133] Post, § 297.

[134] Wyatt v. State, 2 Swan (Tenn.) 394; State v. Brooks, 76 N. C. 1.

[135] 4 Bl. Comm. 205. "Such hurt of any part of a man's body, whereby he is rendered less able, in fighting, to defend himself, or to annoy his adversary." 1 Hawk. P. C. c. 15, § 1, Beale's Cas. 419.

character of the member injured. Cutting off or disabling or weakening a man's hand, or finger, or foot, or striking out his eye or a fore tooth, were mayhems at common law, but it was not mayhem to cut off his ear or nose, as this did not weaken, but merely disfigured him.[136] Castration is mayhem at common law.[137] In most states this offense has been extended by statute to include injuries merely disfiguring a person.[138] Consent of the person maimed is no defense. If a man procures another to cut off his hand, both are guilty.[139]

223. Intent—Malice.

Both at common law and under the statutes, the injury must be done willfully and maliciously;[140] but it is not necessary that

---

[136] 4 Bl. Comm. 205; 1 East. P. C. 393; Reg. v. Hagan, 8 Car. & P. 167.

[137] 4 Bl. Comm. 206.

[138] See State v. Girkin, 1 Ired. (N. C.) 121; Godfrey v. People, 63 N. Y. 207; State v. Skidmore, 87 N. C. 509; State v. Jones, 70 Iowa, 505.

[139] Wright's Case, Co. Litt. 127 a, Beale's Cas. 145.

[140] State v. Girkin, 1 Ired. (N. C.) 121; Molette v. State, 49 Ala. 18; Werley v. State, 11 Humph. (Tenn.) 172; Terrell v. State, 86 Tenn. 523.

it shall be premeditated. It may be inflicted in a sudden affray.[141] To injure another, however, in necessary self-defense against an attempt to kill or do great bodily harm, is not mayhem.[142] Some of the statutes expressly require an intent to inflict the particular injury,[143] and some require lying in wait, or some other act showing premeditation and deliberation.[144]

III. FALSE IMPRISONMENT.

224. Definition.—False imprisonment is the unlawful detention of a person. Like an assault, which it generally includes, it is punishable as a misdemeanor at common law.[145] In most states it is expressly punished by statute.

225. The Detention.

Both at common law, and generally under

---

141 State v. Simmons, 3 Ala. 497; State v. Girkin, 1 Ired. (N. C.) 121; State v. Jones, 70 Iowa, 505; State v. Bloedow, 45 Wis. 279; Terrell v. State, 86 Tenn. 523.

142 State v. Danforth, 3 Conn. 112.

143 See State v. Evans, 1 Hayw. (N. C.) 325; State v. Simmons, 3 Ala. 497; Mollette v. State, 49 Ala. 18; Slattery v. State, 41 Tex. 619; Davis v. State, 22 Tex. App. 45.

144 See Godfrey v. People, 63 N. Y. 207.

145 3 Bl. Comm. 127; 4 Bl. Comm. 218; Com. v. Blodgett, 12 Metc. (Mass.) 56; Campbell v. State, 48 Ga. 353.

the statutes, every confinement of a person is an imprisonment, whether, as was said by Blackstone, it be in the common prison, or in a private house, or in the stocks, or by forcibly detaining one in the public streets.[146] Usually a false imprisonment includes an assault or assault and battery, but this is not necessarily the case. There may be an imprisonment by words alone, as where an officer tells a person that he is under arrest, and the person submits;[147] but words alone are not sufficient to constitute an assault and battery, or even an assault.[148] To constitute a false imprisonment, the means of detention are not material. There need be no actual force, nor even a touching of the person. As stated above, if an officer tells a person that he arrests him, and the person submits, there is a detention, and, if the arrest is unlawful, a false imprisonment.[149] When there is no actual force, the party must

---

[146] 3 Bl. Comm. 127; 2 Inst. 589; State v. Lunsford, 81 N. C. 528; People v. Wheeler, 73 Cal. 252.

[147] Pike v. Hanson, 9 N. H. 493; Grainger v. Hill, 4 Bing. N. C. 212; note 149, infra.

[148] Ante, § 198.

[149] Pike v. Hanson, 9 N. H. 493; Grainger v. Hill, 4 Bing. N. C. 212; Smith v. State, 7 Humph.

reasonably apprehend force in case he does not submit.[150] And he must submit.[151] It is also necessary that the officer or other person shall intend a detention or restraint, and that the other party shall so understand.[152] There can be no imprisonment unless it is against the will of the party imprisoned.[153]

The place of imprisonment is not material. As was stated above, it may be in a prison, or in a private house. Or it may be by merely detaining a person against his will in the street, or in a field, or in any other place whatever.[154]

226. Unlawfulness of Detention.

To constitute a *false* imprisonment, the detention must be unlawful. In other words, it must be without sufficient lawful author-

---

(Tenn.) 43. And see State v. Lunsford, 81 N. C. 528; Jones v. State, 8 Tex. App. 365.

[150] Smith v. State, 7 Humph. (Tenn.) 43; McClure v. State, 26 Tex. App. 102.

[151] Kirk v. Garrett, 84 Md. 383; Hill v. Taylor, 50 Mich. 549.

[152] Limbeck v. Gerry, 15 Misc. Rep. (N. Y.) 663.

[153] Floyd v. State, 12 Ark. 43, 54 Am. Dec. 250; State v. Lunsford, 81 N. C. 528.

[154] 3 Bl. Comm. 127; People v. Wheeler, 73 Cal. 252; Floyd v. State, 12 Ark. 43, 54 Am. Dec. 250.

ity.[155] There is no false imprisonment where an officer or private individual makes a lawful arrest, or where a jailer detains a prisoner lawfully committed to his custody. If, however, an arrest is made without a warrant when a warrant is necessary, the arrest and detention are unlawful, and constitute a false imprisonment.[156] The same is true if a warrant or commitment is void on its face, either because it was issued by a person having no authority, or because it is not in the form required by law, for a warrant or commitment that is void on its face is no protection.[157] False imprisonment may also arise by executing a lawful warrant or process at an unlawful time, as on Sunday, when a statute prohibits its execution on that day.[158]

A parent or teacher, or one in *loco parentis,* is not guilty of false imprisonment in re-

---

[155] 3 Bl. Comm. 127; Floyd v. State, 12 Ark. 43, 54 Am. Dec. 250; Sewell v. State, 61 Ga. 496; Barber v. State, 13 Fla. 675; Cargill v. State, 8 Tex. App. 431; Beville v. State, 16 Tex. App. 70.

[156] State v. Hunter, 106 N. C. 796.

[157] Winchester v. Everett, 80 Me. 535, 6 Am. St. Rep. 228.

[158] 3 Bl. Comm. 127.

straining his child or pupil, if the restraint is not clearly unreasonable and immoderate,[159] but it may be so clearly immoderate and cruel as to render him guilty.[160]

Abuse of authority, or of process that is valid, may render an officer guilty of a false imprisonment, as where he detains the person arrested for an unreasonable time before presenting him for examination or trial as required by law, [161] or wrongfully refuses to take bail, or to allow the prisoner to obtain his release on bail,[162] or unlawfully detains a prisoner after he has become entitled to be discharged.[163]

227. Intent—Malice.

All persons are chargeable with a knowledge of the law, and, if a person unlawfully arrests or detains another with full knowl-

---

[159] Johnson v. State, 2 Humph. (Tenn.) 283; Com. v. Randall, 4 Gray (Mass.) 36.

[160] Fletcher v. People, 52 Ill. 395; Com. v. Randall, 4 Gray (Mass.) 36.

[161] Anderson v. Beck, 64 Miss. 113; Twilley v. Perkins, 77 Md. 252, 39 Am. St. Rep. 408.

[162] Manning v. Mitchell, 73 Ga. 660. Compare Cargill v. State, 8 Tex. App. 431.

[163] Bath v. Metcalf, 145 Mass. 274, 1 Am. St. Rep. 455.

edge of the facts, he is guilty of a false imprisonment, without regard to his motive. He must, of course, intend a detention, but his motive is entirely immaterial. Malice is not at all essential. Thus, a police officer or jailer is indictable for false imprisonment if he arrests or detains another under a warrant or commitment that is void on its face, though he may act in good faith, and in the belief that it is valid.[164]

IV. KIDNAPPING.

228. Definition.—Kidnapping, at common law, is the forcible abduction or stealing away of a man, woman, or child from their own country, and sending them into another.[165] Statutory definitions are somewhat different.

229. Nature of the Offense.

Both by the Jewish law and by the civil law, kidnapping was punished by death, but by the English common law it was merely a misdemeanor punishable by fine, imprisonment, and pillory.[166] The offense is very generally punished by statute in this country, but it is not necessary under the statutes that the person kidnapped shall be taken into an-

---

[164] See 12 Am. & Eng. Enc. Law (2d Ed.) 726.

[165] 4 Bl. Comm. 219.

[166] 4 Bl. Comm. 219.

other country.[167] While the element of force is required by the definition, actual force is not always necessary. Fraud or intimidation may suffice.[168] There is no kidnapping if the person taken freely consents to the taking, provided he or she is capable of consenting, and there is no fraud.[169] But a child of very tender years is not competent to give a valid consent.[170] The same is true of a person who is too drunk to consent.[171] Consent induced by fraud, or by intimidation and duress, is not a valid consent, and is therefore no defense.[172]

---

[167] See State v. Rollins, 8 N. H. 550.

[168] See Moody v. People, 20 Ill. 315; Payson v. Macomber, 3 Allen (Mass.) 69; People v. De Leon, 109 N. Y. 226; Hadden v. People, 25 N. Y. 372; Schnicker v. People, 88 N. Y. 192.

To get a sailor intoxicated for the purpose of getting him on board a vessel without his consent, and taking him on board while in that condition, is kidnapping, under the New York statute. Hadden v. People, supra.

[169] 1 Whart Crim. Law, § 590.

[170] State v. Rollins, 8 N. H. 550; State v. Farrar, 41 N. H. 53.

[171] Hadden v. People, 25 N. Y. 372.

[172] Moody v. People, 20 Ill. 315; People v. De Leon, 109 N. Y. 226; note 168, supra.

V. ABDUCTION.

230. Definition.—In England and in this country, statutes have been enacted punishing as abduction the taking or detaining of women against their will, with intent to marry or defile them, or to cause them to be married or defiled, or the alluring, taking away, or detaining of girls under a certain age without the consent of their parent or other person having lawful care or charge of them, or the taking or enticing of girls for the purpose of prostitution. The statutes vary in the different jurisdictions.

231. Particular Statutes—English Statutes.

By the statute of 3 Hen. VII. c. 2, it was enacted that if any person should, for lucre, take any woman, being maid, widow, or wife, and having substance either in goods or lands, being heir apparent to her ancestors, contrary to her will, and afterwards she should be married to such a wrongdoer, or by his consent to another, or defiled, such person, his procurers and abettors, and such as should knowingly receive such woman, should be deemed guilty of felony. This statute was afterwards repealed, and new statutes enacted. The present statute punishes (1) any person who, from motives of lucre, shall take away or detain, against her will, any woman of any age, having certain property or ex-

pectancies, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person; (2) or who, with such intent, shall fraudulently allure, take away, or detain such woman, being under the age of twenty-one years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her; (3) or who shall by force take away or detain against her will any woman of any age, with such intent; (4) or who shall unlawfully take or cause to be taken any unmarried girl under the age of sixteen years, out of the possession and against the will of her father or mother, or of any person having the lawful care or charge of her; (5) or who shall unlawfully, either by force or fraud, lead or take away, or decoy or entice away or detain, any child under the age of fourteen years, with intent to deprive any parent, guardian, or other person having the lawful care or charge of such child of the possession of such child, or with intent to steal any article upon or about the person of such child, or any person who shall with such intent, and with knowledge of the facts, receive or har-

bor any such child. In the section last mentioned there is an exception in favor of persons claiming to be the father of an illegitimate child.[173]

Statutes in This Country.—In this country the statutes vary greatly in the different states. Some of them embrace provisions contained in the English statute above set out. Others are very different. It would serve no useful purpose to set out these statutes, and no general statement can be made as to their provisions. The student therefore must consult the statute of his own state.[174]

232. Construction of the Statutes.

Under a statute punishing any person who shall unlawfully take or cause to be taken any unmarried girl under a certain age out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, the taking must be a taking under the power, charge, or protection of the taker.[175] And generally under the statutes there must be some taking or en-

[173] 24 & 25 Vict. c. 100, §§ 53-56.

[174] As to these statutes generally, see 1 Am. & Eng. Enc. Law (2d Ed.) 173 et seq.

[175] Steph. Dig. Crim. Law, art. 262. Where two girls under sixteen years of age run away from home together, neither is guilty of the abduction

ticing, and not merely a receiving or harboring.[176] It is generally immaterial whether the girl is taken with her consent or at her own suggestion, or against her will.[177]

---

of the other. Reg. v. Meadows, 1 Car. & K. 399, Dears. C. C. 161, note.

A man is not bound to return to her father's custody a girl who, without any inducement on his part, has left her home, and has come to him; but if, at any time, he has attempted to induce her to leave home without her parents' consent, and she afterwards does so, he is guilty of abducting her, even though he disapproves of the act at the particular time at which she gives effect to his previous persuasions. Reg. v. Olifier, 10 Cox, C. C. 402. See, also, People v. Parshall, 6 Park. Cr. R. (N. Y.) 129.

[176] Reg. v. Olifier, 10 Cox, C. C. 402 (preceding note); Reg. v. Hibbert, L. R. 1 C. C. 184, 11 Cox, C. C. 246; Reg. v. Green, 3 Fost. & F. 274; People v. Plath, 100 N. Y. 590, 53 Am. Rep. 236; People v. Parshall, 6 Park. Cr. R. (N. Y.) 129.

[177] Where a girl under sixteen asked a man, by whom she had been seduced, to elope with her, and he did so, it was held that he was guilty of abduction. Reg. v. Biswell, 2 Cox, C. C. 279. See, also, Reg. v. Robins, 1 Car. & K. 456; Reg. v. Kipps, 4 Cox, C. C. 167; People v. Cook, 61 Cal. 478; Tucker v. State, 8 Lea (Tenn.) 633; State v. Stone, 106 Mo. 1.

It is otherwise under some statutes. See Lampton v. State (Miss.) 11 South. 656.

The fact that the taker believes in good faith that the girl is above the age mentioned in the statute is no defense;[178] but it seems to be necessary that he shall know or have reason to believe that she is under the lawful care or charge of her father, mother, or some other person.[179] It also seems that there must be some improper motive.[180]

---

[178] Reg. v. Prince, L. R. 2 C. C. 154, 13 Cox, C. C. 138; Reg. v. Robins, 1 Car. & K. 456; Reg. v. Olifier, 10 Cox, C. C. 402; Reg. v. Mycock, 12 Cox, C. C. 28; People v. Fowler, 88 Cal. 138; State v. Johnson, 115 Mo. 480. Contra, Mason v. State, 29 Tex. App. 24.

[179] Steph. Dig. Crim. Law, art. 262. Thus, where a man met a girl under sixteen in the street, and got her to stay with him for several hours, during which time he seduced her, and then took her back to the place where he found her, and she returned home, but he was not aware at the time that she had a father or mother living, it was held that he was not guilty of abduction. Reg. v. Hibbert, L. R. 1 C. C. 184, 11 Cox, C. C. 246. See, also, Reg. v. Green, 3 Fost. & F. 274.

[180] Thus, in Reg. v. Tinkler, 1 Fost. & F. 513, Beale's Cas. 285, where the defendant was indicted for the abduction of a girl under sixteen, and it did not appear that he had any improper motive, the jury was directed to acquit him if they thought he merely wished to have the child

The expression "taking out of the possession" means taking the girl to some place where the person in whose charge she is cannot exercise control over her, for some purpose inconsistent with the objects of such control.[181] Where a lady persuaded a girl under sixteen to leave her father's house and come to her house for a short time, for the purpose of going to the play with her, it was held that there was no abduction.[182] A taking for a short time only may amount to an abduction. Thus, where a man persuaded a girl to leave her father's house and sleep with him for three nights, and then sent her back, it was held an abduction.[183]

---

to live with him, and honestly believed that he had a right to the custody of the child, although he might have had no such right. Compare, however, Reg. v. Booth, 12 Cox, C. C. 231.

[181] Steph. Dig. Crim. Law, art. 262. See Slocum v. People, 90 Ill. 274.

A girl who is away from her home is still in the custody or possession of her father, if she intends to return to her home. Reg. v. Mycock, 12 Cox, C. C. 28.

[182] Steph. Dig. Crim. Law, p. 199; Reg. v. Timmins, Bell, C. C. 276, 8 Cox, C. C. 401.

[183] Reg. v. Timmins, Bell, C. C. 276, 8 Cox, C. C. 401. See, also, Reg. v. Baillie, 8 Cox, C. C. 238.

When the taking is required, as in the English statute, to be against the will of the father or other person having the care or charge of the girl, the taking must be without his consent. But it is not necessary, unless expressly required by the statute, to show a trespass or force, or anything of that nature, in the taking. Persuasion or enticement is sufficient.[184] If the consent of the person from whose possession the child is taken is obtained by fraud, the taking is against his will, within the meaning of the statute.[185]

Enticement for the Purpose of Prostitution or Concubinage.—It has been held that, to constitute the statutory offense of enticing or taking away an unmarried female "for the

---

[184] Reg. v. Frazer, 8 Cox, C. C. 446; Reg. v. Hopkins, Car. & M. 254; Reg. v. Biswell, 2 Cox, C. C. 279; Reg. v. Kipps, 4 Cox, C. C. 167; Reg. v. Robb, 4 Fost. & F. 59; State v. Gordon, 46 N. J. Law, 432; People v. Carrier, 46 Mich. 442; State v. Johnson, 115 Mo. 480; State v. Chisenhall, 106 N. C. 676; Mason v. State, 29 Tex. App. 24; State v. Jameson, 38 Minn. 21.

[185] Thus, when a man induced a girl's father to permit her to go away by falsely pretending that he would find a place for her, he was held guilty of abduction. Reg. v. Hopkins, Car. & M. 254.

purpose of prostitution," the enticement or abduction must be for the purpose of making a "common prostitute" of the woman, and that a man is not guilty of this offense where he entices or abducts a female for the purpose of illicit intercourse with himself alone, for the term "prostitution" imports the practice of a female offering her body to an indiscriminate intercourse with men,—the common lewdness of a female.[186]

When the statute punishes a taking for the purpose of concubinage, this purpose must be shown.[187] The courts, however, do not agree as to what constitutes a taking for the purpose

---

[186] State v. Stoyell, 54 Me. 24, 89 Am. Dec. 716. In this case, a statute punished any person who should fraudulently and deceitfully entice or take away an unmarried female "for the purpose of prostitution at a house of ill fame, assignation, or elsewhere," etc. The defendant had, by false representations, induced a female to go with him to a neighboring town, where, having induced partial intoxication, he had repeated sexual intercourse with her. It was held that this was not within the statute, as his purpose was not to make her a common prostitute, but to have intercourse with her himself only. See, also, Haygood v. State, 98 Ala. 61; Nichols v. State, 127 Ind. 406.

[187] State v. Gibson, 108 Mo. 575.

of concubinage. Some of them require more than a single act of intercourse, while others do not.[188] In some jurisdictions the term has been held to apply to any lewd intercourse between the parties.[189]

VI. HOMICIDE.

(A) The Homicide.

233. Definition.—Homicide is any killing of a human being. It is either—

1. **Justifiable,**
2. **Excusable, or**
3. **Felonious. And a felonious homicide is either—**
   - **(a) Murder, or**
   - **(b) Manslaughter.**

To constitute a homicide, and to render a person accused responsible at all, aside from any question as to whether he is guilty of murder or manslaughter, or whether the homicide is justifiable or excusable,

1. **The killing must be of a living human being, and not of a child unborn. Any human being is the subject of a homicide.**
2. **The means by which the death is caused are immaterial.**

---

[188] See State v. Gibson, 111 Mo. 92; State v. Johnson, 115 Mo. 480; State v. Wilkinson, 121 Mo. 485. See, also, State v. Richardson, 117 Mo. 586; Slocum v. People, 90 Ill. 274; State v. Overstreet, 43 Kan. 299.

[189] People v. Cummons, 56 Mich. 544.

3. **The death must have been caused by the act or omission of the accused. If this is so, he is none the less responsible because other causes contributed.**
4. **Death must happen within a year and a day after the injury.**

Mode of Treatment.—Every killing of one human being by another is a homicide, but every homicide is not a crime. It may be justifiable, in which case no fault whatever is imputable to the slayer; or it may be excusable, in which case some fault is imputable to him, though he is not now punished. A homicide which is not justifiable or excusable is felonious. It is murder if committed with malice aforethought, and manslaughter if committed without malice aforethought. Before taking up these different grades or kinds of homicide, it is necessary to deal with those principles of the law of homicide that relate solely to the killing,—principles that determine, not whether a particular homicide was murder or manslaughter, or whether it was justifiable or excusable, but whether there has been any homicide at all. They relate to (1) the subject of a homicide, (2) the manner of causing death, and (3) the relation of cause and effect, or causal connection, be-

tween the act or omission of the accused and the death.

234. The Subject of a Homicide.

(*a*) *In General.*—The subject of a homicide must be a living human being. It follows that on a prosecution for murder or manslaughter it is always necessary that it shall appear, either by direct proof or by recognized presumptions, that the deceased was alive at the time when the injury is alleged to have been inflicted.[190] Ordinarily, if it is proved that he was alive shortly before the alleged injury, continuance of life may be presumed.[191]

---

[190] 1 Whart Crim. Law (10th Ed.) § 309; U. S. v. Hewson, 7 Law Rep. 361, Fed. Cas. No. 15,360; Com. v. Harman, 4 Barr (Pa.) 269.

In U. S. v. Hewson, supra, a mother was charged with the murder of her child by throwing it overboard from a vessel. It appeared that at the time she was suffering from puerperal fever, and from great mental distress and excitement, and there was some doubt as to whether the child was alive or dead when she threw it overboard. Judge Story charged the jury that she could not be convicted without proof that the child was then alive, and she was acquitted.

[191] Com. v. Harman, supra.

(*b*) *Infanticide — Unborn Children.*—A child is not a living human being, so as to be the subject of a homicide, until it has been fully born alive, and it is not fully born until an independent circulation has been established.[192] The destruction of an unborn child, even though it be destroyed in the very process of delivery, is not homicide at all, but, if it is any offense, it is simply a misdemeanor commonly known as "abortion."[193] According to the better opinion, a child is not fully born, and is not the subject of homicide, until the umbilical cord has been severed, for until then the blood of the child is renovated through the lungs of the mother, and its circulation, therefore, is not independent.[194] It is not enough to show that the child had

---

[192] 3 Inst. 50; 1 Hale. P. C. 133. Beale's Cas. 419; 1 Hawk. P. C. c. 31, § 16; Rex v. Enoch, 5 Car. & P. 539; Rex v. Brain, 6 Car. & P. 349; Reg. v. Trilloe, Car. & M. 650; Wallace v. State, 7 Tex. App. 570; Wallace v. State, 10 Tex. App. 255; State v. Winthrop, 43 Iowa, 519, 22 Am. Rep. 257; Evans v. People, 49 N. Y. 86; Com. v. O'Donohue, 8 Phila. (Pa.) 623.

[193] Post, § 289 et seq.

[194] State v. Winthrop, 43 Iowa, 519, 22 Am. Rep. 257. Some early English cases are to the contrary: Reg. v. Trilloe, Car. & M. 650; Reg. v.

breathed, for a child may breathe before it has an independent circulation.[195]

It is not necessary that the child shall be fully born before the *injury* is inflicted. If a child is wounded by an instrument, or if a drug is administered, while the child is in its mother's womb, or while it is in process of delivery, and it is fully born alive, and dies *afterwards* as a result of the wound or drug, it is homicide.[196]

(*c*) *Criminal Sentenced to Death.*—A criminal under sentence of death is as much

---

Reeves, 9 Car. & P. 25; Rex v. Crutchley, 7 Car. & P. 814.

[195] Rex v. Sellis, 7 Car. & P. 850; Rex. v. Enoch, 5 Car. & P. 539. It is not necessary to show that the child had breathed, for a child may not breathe for a while after an independent circulation has been established. Rex v. Brain, 6 Car. & P. 349.

[196] 3 Inst. 50; Rex v. Senior, 1 Mood. C. C. 346, 1 Lewin, C. C. 183, note.

In Reg. v. West, 2 Car. & K. 784, it was held that if a person, intending to procure an abortion, does an act which causes a child to be born so much earlier than the natural time that it is born in a state in which it is much less capable of living, and it afterwards dies in consequence of its exposure to the external world, he is guilty of murder.

the subject of a felonious homicide as any other person. If he is executed in a way not authorized by law, or by a person not authorized by law to execute him, the homicide is felonious.[197] And a man is guilty of murder as principal in the second degree or accessary before the fact, according to the circumstances, if he advises or abets a criminal sentenced to death in the commission of suicide.[198]

(*d*) *Alien Enemies.*—An alien enemy is the subject of a felonious homicide. It is not a crime to kill an alien enemy in time of war, and in the actual exercise of war, but, if the killing is not in the actual exercise of war, the homicide is murder or manslaughter, according to the circumstances.[199]

235. Manner of Causing Death.

(*a*) *In General.*—To render a person responsible for a homicide, it need not have been caused by any particular means. As was said in an early English case: "Murder may be committed without any stroke. The

---

[197] Post, § 267.

[198] Post, § 250; Com. v. Bowen, 13 Mass. 356, 7 Am. Dec. 154.

[199] 3 Inst. 50; 1 Hale, P. C. 433, Beale's Cas. 419; State v. Gut, 13 Minn. 341.

law has not confined the offense to any particular circumstances or manner of killing; but there are as many ways to commit murder as there are to destroy a man, provided the act be done with malice, express or implied."[200] There are many cases in the reports in which a man has been held responsible for a homicide caused by unusual means,—as, for example, by communicating a venereal disease to a woman in committing rape;[201] by forcibly confining a person, against his will, in an unwholesome and dangerous room;[202] or exposing a helpless person to a contagious disease,[203] inclement weather,[204] or other dangers.[205] There is no good reason to doubt

---

[200] Rex. v. Huggins, 2 Ld. Raym. 1574, 1578, 2 Strange, 882. See, also, 1 East, P. C. c. 5 § 13; 1 Hale, P. C. 425, Beale's Cas. 418; Nixon v. People, 2 Scam. (Ill.) 267, 269.

"The killing," says Blackstone, "may be by poisoning, striking, starving, drowning, and a thousand other forms of death, by which human nature may be overcome." 4 Bl. Comm. 196.

[201] Reg. v. Greenwood, 7 Cox, C. C. 404, Beale's Cas. 424.

[202] Rex v. Huggins, 2 Ld. Raym. 1574.

[203] Castill v. Bambridge, 2 Strange, 854, Beale's Cas. 420.

[204] Pult. de Pace, 122, Beale's Cas. 420; Reg.

that a man would be guilty of murder if he should falsely and maliciously accuse another of a capital offense, and by false testimony procure his conviction and execution.[206]

(*b*) *Omission to Act.*—The death need not necessarily be caused by a positive act. It may be caused by an omission to act at all, when one is under a legal duty to act. Thus, it is murder or manslaughter, according to the circumstances, if a man causes the death of his helpless wife or child by inexcusable failure to furnish shelter, food, or medical attendance;[207] if a switchman causes the death of

---

v. Martin, 11 Cox, C. C. 136; Reg. v. Walters, Car. & M. 164; Nixon v. People, 2 Scam. (Ill.) 267.

[205] In U. S. v. Freeman, 4 Mason, 505, Fed. Cas. No. 15,162, the captain of a vessel compelled a seaman to go aloft, when, by reason of debility and exhaustion, he was unable to do so safely, and he fell, and was drowned. It was held that he was responsible for the death, and was guilty of felonious homicide.

In Rex v. Carr, 8 Car. & P. 163, an iron founder who had repaired a cannon with lead in a dangerous manner, so that it burst and killed another, was held responsible for the death.

[206] Reg. v. Macdaniel, 1 Leach, C. C. 44, 1 East, P. C. 333, Beale's Cas. 421.

[207] Reg. v. Conde, 10 Cox, C. C. 547, Beale's

a person on a railroad train by inexcusable failure to adjust a switch;[208] or if an employe in a mine causes the death of a fellow miner by neglecting to ventilate the mine, when he is charged with this duty.[209]

(c) *Working upon the Feelings—Fright, Grief, etc.*—It has been said that one cannot commit a homicide by working on the feelings of another,—that there must be "some physical or corporeal injury, negative or positive, as a blow, deprivation of necessaries, and the like."[210] But this statement is apt to mislead, unless properly limited. It is no doubt very true that the law cannot undertake to punish as for homicide, when it is claimed that the death was caused solely by grief or terror, for the death could not be traced to

---

Cas. 424; Reg. v. Plummer, 1 Car. & K. 600, 8 Jur. 921; Rex v. Friend, Russ. & R. 20, Beale's Cas. 190; post, §§ 247, 265 d.

[208] State v. O'Brien, 32 N. J. Law, 169.

[209] Reg. v. Haines, 2 Car. & K. 368, Beale's Cas. 170. See, also, U. S. v. Knowles, 4 Sawy. 517, Fed. Cas. No. 15,540, where the captain of a vessel neglected to rescue a seaman who had fallen overboard. And see post, §§ 247, 265.

[210] Per Byles, J., in Reg. v. Murton, 3 Fost. & F. 492, Beale's Cas. 426, note.

such causes with any degree of certainty.[211] Working upon the feelings and fears of another, however, may be the direct cause of physical or corporeal injury resulting in death, and in such a case the person causing the injury may be as clearly responsible for the death as if he had used a knife. In an English case a man struck a woman while she was nursing a child, and the child became frightened, and went into convulsions and died. It was held that if the assault upon the mother caused the child's fright, and this caused the convulsions, and they caused the death, the accused was responsible, and was

---

[211] Reg. v. Murton, 3 Fost. & F. 492, Beale's Cas. 426, note; Rex v. Hickman, 5 Car. & P. 151; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

In East, P. C. c. 5, § 13, it is said: "Working upon the fancy of another, or treating him harshly or unkindly, by which he dies of grief or fear, is not such a killing as the law takes notice of." See, also, 1 Hale, P. C. 425, Beale's Cas. 418.

In Reg. v. Murton, supra, it was held that unkind treatment, not amounting to physical injury, by a husband of his wife, as the use of harsh language, turning her out of her home, etc., whereby it was charged that her spirit and heart were broken, and she died, did not render the husband responsible as for homicide.

guilty of manslaughter at least.[212] Many other cases are to be found in the reports.[213] In all such cases the fear must be well grounded and reasonable under the circumstances.[214]

---

[212] Reg. v. Towers, 12 Cox, C. C. 530, Beale's Cas. 425. See, also, Cox v. People, 80 N. Y. 500.

[213] Reg. v. Halliday, 61 L. T. (N. S.) 701, Beale's Cas. 427; Reg. v. Pitts, Car. & M. 284; Reg. v. Williamson, 1 Cox, C. C. 97; Hendrickson v. Com., 85 Ky. 281, Beale's Cas. 430; Blackburn v. State, 23 Ohio St. 146; Adams v. People, 109 Ill. 444, 50 Am. Rep. 617.

A man is guilty of homicide if he intentionally causes a panic in a crowded theater or other building by a false alarm of fire, and people are, as a natural consequence, crushed to death in trying to escape. Reg. v. Martin, 14 Cox, C. C. 633, 8 Q. B. Div. 54.

A man is responsible for the death of one who jumps from a window, or into the water, from a well-grounded apprehension of violence, threatened by him, which will endanger life. Rex v. Evans, 1 Russ. Crimes, 656; Reg. v. Pitts, Car. & M. 284; Reg. v. Halliday, 61 L. T. (N. S.) 701, Beale's Cas. 427.

In Rex v. Hickman, 5 Car. & P. 151, a man was held guilty of manslaughter where he had charged another person on horseback, and so frightened him that he spurred his horse, and, in consequence, the horse fell, and caused his death.

[214] In Hendrickson v. Com., 85 Ky. 281, Beale's

(*d*) *Compelling One to Kill Himself.*—What has just been said shows that a man does not escape responsibility for a homicide because it was immediately caused by the act of the deceased himself, if that act was caused by him. And this is true in many other cases. If a man, for instance, sets poison or a spring gun for another, he is responsible if the other innocently takes the poison or discharges the gun, and is thereby killed.[215] And if men board a railroad train, draw deadly weapons on a passenger, rob him,

---

Cas. 430, the defendant and his wife had a fight, and on his starting for his knife, and threatening to cut her throat, she fled from the house. The next morning she was found frozen to death in the snow. After the defendant was convicted of manslaughter, it was held, on appeal, that the court properly instructed the jury to convict "if they believed that the accused used such force and violence as to cause the deceased to leave the house from fear of death or great bodily harm;" but that, as it appeared that the husband was a cripple, and the wife, from temper and physique, was well able to contend with him, it was error to refuse to submit to the jury the question whether such fear was well-grounded and reasonable. See, also, State v. Preslar, 3 Jones Law (N. C.) 421.

[215] Gore's Case, 9 Coke, 81 a, Plowd. 575, Beale's

and by threats cause him to jump from the train while it is in motion, and he is thereby killed, they are guilty of murder.[216] If a person puts poison in a glass of medicine with intent to cause another's death, and another innocently takes it and dies, he is none the less responsible because the deceased stirred the mixture and thereby made it deadly, and because it would not have caused death without the stirring.[217]

(*e*) *Killing by an Innocent Third Person.*—We have seen in a previous chapter that a man may commit a homicide himself through the agency of an innocent third person, as by giving poison to a child, or to an adult who is ignorant of its character, with directions that the latter shall give it to another.[218]

236. Casual Connection between the Act or Omission of the Accused and the Death—In General.

A man is not responsible for the death of

Cas. 209; Reg. v. Michael, 9 Car. & P. 356; Reg. v. Chamberlain, 10 Cox, C. C. 486, Beale's Cas. 187; Harvey v. State, 40 Ind. 516.

[216] Adams v. People, 109 Ill. 444, 50 Am. Rep. 617.

[217] Gore's Case, 9 Coke, 81 a, Beale's Cas. 209.

[218] Ante, § 168.

another, unless it was *caused* by his own act or omission, or by the act or omission of some other person for which he is responsible under the rules stated in the chapter relating to principals and accessaries.[219] If his unlawful act or omission was merely a *condition,* and not a *cause* of the death, he is not responsible.[220]

In a Massachusetts case it was sought to hold one of a party of rioters responsible for the death of a bystander who was shot by a soldier engaged in suppressing the riot, on the ground that it was a result of the unlawful act—the riot—in which he was engaged. The court held that he was not responsible, as the death was not caused by his act, nor by the act of any of the persons with whom he was acting in concert. The riot was a condition, and not a cause of the death.[221] And in a Michigan case, where a man was trampled and killed by a horse, after he had

---

[219] Ante, § 163 et seq.

[220] Reg. v. Pocock, 5 Cox, C. C. 172, Beale's Cas. 423; Rex v. Waters, 6 Car. & P. 328; Com. v. Campbell, 7 Allen (Mass.) 541, 83 Am. Dec. 705; People v. Rockwell, 39 Mich. 503; Reg. v. Towers, 12 Cox, C. C. 530, Beale's Cas. 425.

[221] Com. v. Campbell, supra.

been knocked down by the accused, and the accused was charged with manslaughter on the ground that his unlawful act was the cause of the death, it was held that the trampling by the horse was not a natural consequence of the act of the accused, and that he was not responsible.[222]

Omission to Act.—The same principle applies where a man is charged with manslaughter because of omission to act. There must have been a personal duty, the neglect of which has directly caused death. Thus, it has been held that the trustees of a highway, who fail to have the highway repaired, are not for that reason guilty of the manslaughter of a traveler who is killed by reason of the want of repair. "In all the cases of indictment for manslaughter;" said Erle, J., " where the death has been occasioned by omission to discharge a duty, it will be found that the duty was one connected with life, so that the ordinary consequence of neglecting it would be death."[223]

---

[222] People v. Rockwell, supra.

[223] Reg. v. Pocock, 5 Cox, C. C. 172. Beale's Cas. 423.

237. Contributing Causes.

(*a*) *In General.*—It is not necessary that the act or omission of the accused shall have been the *sole cause* of the death. If the unlawful act or omission of a person is a proximate cause of another's death, and not merely a condition, he is not relieved from responsibility by reason of the fact that other causes contributed.[224] But if the death resulted solely from some *independent cause*, and not from his act or omission, he is not responsible; and it can make no difference that it would have resulted from his act or omission, if the independent cause had not intervened.[225] These principles have been applied in a variety of cases. For convenience in treatment, they may be classified as cases in which the contributing or intervening cause was (1) the state or condition of the deceased at the time of the injury; (2) the conduct of

---

[224] Rex v. Martin, 5 Car. & P. 130; Reg. v. Holland, 2 Mood. & R. 351, Beale's Cas. 164; Reg. v. Plummer, 1 Car. & K. 600; Reg. v. Swindall, 2 Car. & K. 230, Beale's Cas. 167; Reg. v. Haines, 2 Car. & K. 368, Beale's Cas. 170; Com. v. Fox, 7 Gray (Mass.) 586; Burnett v. State, 14 Lea (Tenn.) 439.

[225] Livingston v. Com., 14 Grat. (Va.) 592,

the deceased at the time of the injury; (3) the state or condition of the deceased after the injury; (4) the conduct of the deceased after the injury; (5) the act or omission of some third person before or at the time of the injury, or afterwards.

(*b*) *State or Condition of the Deceased at the Time of the Injury.*—If an injury causes death, the person who inflicted it cannot escape responsibility for the homicide by showing that the deceased, by reason of disease or drunkenness, or other physical infirmity, as heart disease, for example, was more susceptible to fatal effects, or even that the injury would not have proved fatal except for his condition; and it can make no difference that the accused did not know of his condition.[226] Of course, if the disease or other infirmity of

[226] In Rex v. Johnson, 1 Lewin, C. C. 164, where the deceased had died from a blow received in a fight with the accused, it appeared that he was intoxicated at the time, and a surgeon expressed the opinion that the blow would not have caused his death if he had been sober. Hallock, B., directed an acquittal on the ground, as stated by him, that where death is occasioned partly by a blow, and partly by a predisposing circumstance, it is impossible to apportion the operation of the several causes, and to say with cer-

the deceased was the sole cause of his death, and the act of the accused did not accelerate it, or contribute to it at all, he cannot be held responsible.[227] To convict, the jury must be satisfied beyond a reasonable doubt that death would not have occurred at the time it did, except for the act of the accused. If it is left reasonably in doubt whether the disease or other infirmity or the act of the accused was the cause of the death, there must be an acquittal.[228]

---

tainty that the death was occasioned by any one of them in particular.

This decision, however, is clearly unsound, and there are many decisions opposed to it. In Reg. v. Martin, 5 Car. & P. 130, it appeared that the deceased was in an infirm state of health at the time of the blow which caused his death. Parke, B., said to the jury: "It is said that the deceased was in a bad state of health, but that is perfectly immaterial, as, if the prisoner was so unfortunate as to accelerate her death, he must answer for it." See, also, Reg. v. Plummer, 1 Car. & K. 600; Com. v. Fox, 7 Gray (Mass.) 586; State v. O'Brien, 81 Iowa, 88, Beale's Cas. 433.

[227] Reg. v. Davis, 15 Cox, C. C. 174, Beale's Cas. 171; State v. O'Brien, 81 Iowa, 88, Beale's Cas. 433; Com. v. Fox, 7 Gray (Mass.) 586; Livingston v. Com., 14 Grat. (Va.) 592.

[228] Com. v. Fox, 7 Gray (Mass.) 586.

(*c*) *Conduct of the Deceased at the Time of the Injury.*—If the act or omission of a person was the cause, and not merely a condition, of another's death, he has clearly committed *homicide,* whatever may have been the conduct of the deceased at the time of the injury. The homicide, however, may be rendered justifiable or excusable by the conduct of the deceased.[229]

(*d*) *Contributory Negligence.*—The rule that there can be no recovery in a civil action for personal injury or death resulting therefrom, if the person injured or killed was guilty of contributory negligence, has no application in prosecutions for homicide.[230] If a person by criminal negligence, as by reckless driving, or by exposing poison or dynamite, causes another's death, he is responsible therefor, and guilty of murder or manslaughter, according to the circumstances, notwithstanding the fact that the deceased may have been guilty of negligence contributing to his death, and notwithstanding the fact that he would not have been killed if he had used due care.[231]

---

229 Post, § 275 et seq.

230 Ante, § 158.

231 Such a defense as this was allowed on a

(*e*) *State or Condition of the Deceased after the Injury.*—If death results from an injury, the person who inflicted it is responsible, though the injury may have resulted in disease or sickness, as gangrene or fever, and the disease or sickness may have been the im-

---

charge of manslaughter in Reg. v. Birchall, 4 Fost. & F. 1087; but this view is wrong, and is opposed by a number of cases.

In Reg. v. Longbottom, 3 Cox, C. C. 439, where the defendants were indicted for manslaughter in negligently driving over a man and killing him, it was held that they were guilty, notwithstanding the deceased was deaf, and was negligently walking in the middle of a public road on a dark night. "There is a very wide difference," said Rolfe, B., "between a civil action for pecuniary compensation for death arising from alleged negligence and a proceeding by way of indictment for manslaughter. The latter is a charge imputing criminal negligence, and there is no balance of blame in charges of felony, but whenever it appears that death has been occasioned by the illegal act of another, that other is guilty of manslaughter in point of law, though it may be that he ought not to be severely punished." The following cases are to the same effect: Reg. v. Swindall, 2 Car. & K. 230, Beale's Cas. 167; Reg. v. Kew, 12 Cox, C. C. 355, Beale's Cas. 165; Reg. v. Dalloway, 2 Cox, C. C. 273, Beale's Cas. 165; Reg. v. Desvignes, 70 L. T. 76; Belk v. People, 125 Ill. 584.

mediate cause of death, for in such a case the death is traceable to the injury as a proximate cause.[232] If, however, the disease or sickness was not caused by the injury, but resulted from some independent cause, the person who inflicted the injury is not responsible, even though it be conceded that the injury would have caused death if the independent cause had not intervened.[233]

(*f*) *Conduct of the Deceased after the Injury.*—If a person injures another, and the injury causes death, he is responsible for the homicide, though the injury may not have been in its nature necessarily mortal, but may have become so because of misconduct or neglect on the part of the deceased, as because of failure or refusal to procure medical treatment, or to submit to a surgical operation, or because of imprudent exposure, or the use of intoxicating liquors.[234] In an English case

---

[232] 1 Hale, P. C. 428; Reg. v. Holland, 2 Mood. & R. 351, Beale's Cas. 164; Rex v. Tye, Russ. & R. 345; Burnett v. State, 14 Lea (Tenn.) 439. It has been so held, for example, where a wound resulted in lockjaw, and the lockjaw ultimately caused death. Reg. v. Holland, supra.

[233] Livingston v. Com., 14 Grat. (Va.) 592.

[234] 1 Hale, P. C. 428; Rex v. Rew, J. Kelyng, 26,

the deceased was severely cut by the accused across the finger by an iron instrument, and refused to have the finger amputated. At the end of a fortnight lockjaw came on, and the finger was then amputated, but it was too late, and the lockjaw ultimately caused his death. The surgeon was of the opinion that early amputation would probably have saved the life of the deceased, but it was nevertheless held that the accused was responsible.[235]

(*g*) *Acts or Omissions of Third Persons*—(*1*) *In General.*—If a person inflicts a wound, or is otherwise guilty of any criminal act or omission, and such act or omission is *a*

Beale's Cas. 163; Reg. v. Holland, 2 Mood. & R. 351, Beale's Cas. 164; State v. Morphy, 33 Iowa, 270, 11 Am. Rep. 122; Com. v. Hackett, 2 Allen (Mass.) 136.

[235] Reg. v. Holland, supra. In Rex v. Rew, J. Kelyng, 26, Beale's Cas. 163, it was decided as early as the year 1662 that "if one gives wounds to another who neglects the cure of them, or is disorderly, and doth not keep the rule which a person wounded should do, yet, if he die, it is murder or manslaughter, according as the case is in the person who gave the wounds, because, if the wounds had not been, the man had not died; and therefore neglect or disorder in the person who received the wounds shall not excuse the person who gave them."

cause of the death of another, he is not relieved from responsibility for the homicide by the fact that the unlawful act or omission of a third person also contributed to cause the death, or would itself have caused the death. He is not responsible, however, if the act or omission of a third person was the *sole cause* of the death, even though, but for it, his own act or omission would have resulted fatally.[236] If a man wounds another, and the wound causes death, he is responsible for the homicide, though another wound, which would have proved fatal, had previously been inflicted by another. But in such a case the person who inflicted the first wound, if he was not acting in concert with the person who inflicted the second, is not guilty.[237]

If the criminal negligence of a person operates directly to cause another's death, he is none the less responsible because the negligence of a third person contributed.[238]

(2) *Act or Negligence of Physician or*

---

[236] Reg. v. Haines, 2 Car. & K. 368, Beale's Cas. 170; Reg. v. Davis, 15 Cox, C. C. 174, Beale's Cas. 171; People v. Ah Fat, 48 Cal. 61; Fisher v. State, 10 Lea (Tenn.) 151.

[237] People v. Ah Fat, supra.

[238] Reg. v. Swindall, 2 Car. & K. 230, Beale's

Surgeon.—Persons accused of murder or manslaughter have frequently sought to escape responsibility for the homicide on the ground that it was caused by the act of a physician or surgeon in administering chloroform or performing an operation, or by his unskillfulness or neglect in treating the deceased. This defense, however, will not generally prevail. It has repeatedly been held, and it must be regarded as settled, that when a surgical operation is performed or chloroform administered in a proper manner, and under circumstances which render it necessary, in the opinion of competent surgeons, upon one who has received a dangerous wound, though the wound may not be necessarily mortal in itself, and the operation is ineffectual to save the life of the patient, or it or the chloroform is itself the immediate cause of the patient's death, the person who gave the wound is nevertheless responsible for the consequences.[239]

Cas. 167; Reg. v. Haines, 2 Car. & K. 368, Beale's Cas. 170.

[239] Reg. v. Davis, 15 Cox, C. C. 174, Beale's Cas. 171; McAllister v. State, 17 Ala. 434, 52 Am. Dec. 180; State v. Bantley, 44 Conn. 537, 26 Am. Rep. 486; State v. Morphy, 33 Iowa, 270, 11 Am. Rep. 122; Com. v. McPike, 3 Cush.

Nor is he relieved from responsibility by the mere fact that improper or unskillful treatment or negligence on the part of the physician or surgeon contributed to cause death.[240] If it appears, however, that improper treatment was the sole cause of death, the person who gave the wound is not responsible.[241]

238. Lapse of Time between Injury and Death.

To render one responsible for a homicide because of a wound or other injury inflicted by him, the death must occur within a year

---

(Mass.) 181, 50 Am. Dec. 727; Crum v. State, 64 Miss. 1, 60 Am. Rep. 44 (overruling McBeth v. State, 50 Miss. 81). See, also, Reg. v. Johnson, 1 Lewin, C. C. 164; Reg. v. Minnock, 1 Craw. & D 45; Reg. v. Lee, 4 Fost. & F. 63; U. S. v. Warner, 4 McLean, 463, Fed. Cas. No. 16,643; Parsons v. State, 21 Ala. 300; Bowles v. State, 58 Ala. 335; Kee v. State, 28 Ark. 155; Coffman v. Com., 10 Bush. (Ky.) 495; State v. Scott, 12 La. Ann. 274; State v. Baker, 1 Jones (N. C.) 267; Com. v. Green, 1 Ashm. (Pa.) 289.

[240] Reg. v. Davis, 15 Cox, C. C. 174, Beale's Cas. 171; Com. v. Hackett, 2 Allen (Mass.) 136; Parsons v. State, 21 Ala. 300.

[241] 1 Hale, P. C. 428; Reg. v. Cheverton, 2 Fost. & F. 833; Harvey v. State, 40 Ind. 516; State v. Morphy, 33 Iowa, 270, 11 Am. Rep. 122; Com. v. Hackett, 2 Allen (Mass.) 136.

and a day. If it does not, the law conclusively presumes that the death was due to some other cause.[242]

(B) Murder at Common Law.

239. Definition.—Murder is the unlawful killing of a human being with malice aforethought, express or implied.[243]

There is express malice—the homicide not being justifiable or excusable, and not being committed under extenuating circumstances reducing it to manslaughter—

1. **When there is an actual intent to cause the death of the person killed.**
2. **When there is an actual intent to cause the death of any other person.**

Malice is implied, with the same exceptions—

1. **When there is an actual intent to inflict great bodily harm.**

---

[242] 3 Inst. 53; 2 Hale, P. C. 179; 1 Hawk. P. C. c. 23; State v. Orrell, 1 Dev. (N. C.) 139, 17 Am. Dec. 563; People v. Aro, 6 Cal. 207; People v. Kelly, 6 Cal. 210; State v. Mayfield, 66 Mo. 125; Hardin v. State, 4 Tex. App. 355, 370.

[243] Murder is committed, said Lord Coke, "when a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied." 3 Inst. 47. See, also, 4 Bl. Comm. 195; 1 Hale, P. C. 451; Spies v. People, 122 Ill. 1, 3 Am. St. Rep. 320; Bivens v. State, 11 Ark. 455; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

2. When an act is willfully done or a duty willfully omitted, and the natural tendency of the act or omission is to cause death or great bodily harm.
3. Subject, perhaps, to some limitations, when a homicide is committed, though unintentionally, in an attempt to commit or the commission of some other felony.
4. When a homicide is committed, though unintentionally, in resisting a lawful arrest, or in obstructing an officer in his attempt to suppress a riot or affray.

240. Malice Aforethought.

(*a*) *In General.*—The distinguishing characteristic of murder is malice aforethought.[244] When it exists, the homicide is always murder. When it does not exist, the homicide cannot be murder, but is either manslaughter, or else is justifiable or excusable. The expression "malice aforethought" is very technical, and cannot be taken in the ordinary sense of the term "malice." It must be construed according to the decided cases, which have given it a meaning different from that which might be supposed. It

[244] "The killing must be with malice aforethought, to make it the crime of murder. This is the grand criterion which now distinguishes murder from other killing." 4 Bl. Comm. 198.

does not necessarily mean anger, hatred, or ill-will, but, as we shall see in subsequent sections, includes many other unlawful or wrongful motives or conditions of mind. Chief Justice Shaw said in the celebrated Webster Case that it is not confined to ill-will towards one or more individual persons, but is intended to denote "an action flowing from any wicked and corrupt motive,—a thing done *malo animo*,—where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief."[245]

(b) Deliberation and Premeditation.—Where, by statute, murder is divided into degrees, deliberation and premeditation are generally made essential to murder in the first degree.[246] The common law, however,

---

[245] Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711. See, also, 4 Bl. Comm. 198; Fost. C. L. 256; Reg. v. Serne, 16 Cox, C. C. 311, Beale's Cas. 465; State v. Smith, 2 Strob. (S. C.) 77, 47 Am. Dec. 589, Beale's Cas. 468; Com. v. Drum, 58 Pa. St. 9, 19; State v. Douglass, 28 W. Va. 297; McAdams v. State, 25 Ark. 405; State v. Chavis, 80 N. C. 353.

[246] Post, § 253.

recognizes no degrees of murder, and, to constitute murder at common law, deliberation and premeditation are not necessary. In other words, the "malice aforethought" required by the common law need not exist for any length of time before the killing, but it is sufficient if it exists at the time of killing. It may arise simultaneously with the act which causes death.[247] Provoking language, as we shall see, is not sufficient provocation to reduce an intentional killing to manslaughter. Therefore, if a man, when provoked by insulting words, immediately revenges himself by the use of a deadly weapon, and death ensues, there is malice aforethought, and the homicide is murder. It is none the less malice *aforethought* because the act is done suddenly and without deliberation or premeditation.[248] "The law," said

[247] Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; McMillan v. State, 35 Ga. 54; State v. Anderson, 2 Overt. (Tenn.) 6, 5 Am. Dec. 648; McAdams v. State, 25 Ark. 405; State v. Decklotts, 19 Iowa, 447; Peri v. People, 65 Ill. 17; Leighton v. People, 88 N. Y. 117, Beale's Cas. 472; State v. Moore, 69 N. C. 267; Green v. State, 13 Mo. 382.

[248] Com. v. Webster, supra. It was said in this

the Tennessee court, "knows no specific time within which an intent to kill must be formed so as to make it murder. If the will accompanies the act, a moment antecedent to the act itself which causes death, it seems to be as completely sufficient to make the offence murder as if it were a day or any other time." [249]

(c) Express and Implied Malice.—From a very early day malice has been divided into express and implied malice.[250] This distinction has been criticised on the ground that malice must of necessity always be in-

---

case: "It is not the less malice aforethought, within the meaning of the law, because the act is done suddenly after the intention to commit the homicide is formed. It is sufficient that the malicious intention precedes and accompanies the act of homicide. It is manifest, therefore, that the words 'malice aforethought' in the description of murder do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denote purpose and design, in contradistinction to accident and mischance."

[249] State v. Anderson, 2 Overt. (Tenn.) 6, 5 Am. Dec. 648.

[250] 4 Bl. Comm. 198, 199; 1 Hale, P. C. 451.

ferred from the circumstances, and is therefore always implied. In a sense, this is true, but it is not sufficient reason for not recognizing the distinction as it has been understood in the law of homicide. It is convenient, and, if properly understood, it is not misleading. It is expressly recognized by the statutes in some states in dividing murder into degrees. By *express malice* is meant an actual intention to kill. It exists whether the intention be to kill the person who is killed, or to kill some other person.[251] *Implied malice* exists when there is no actual intent to kill any person, but death is caused by conduct which the law regards as showing such an abandoned state of mind as to be equivalent to an actual intent to kill.

---

251 "Express malice," says Blackstone, "is when one, with a sedate and deliberate mind, and formed design, doth kill another, which formed design is evidenced by external circumstances, discovering that inward intention, as lying in wait, antecedent menaces, former grudges, and concerted schemes." 4 Bl. Comm. 198. And see McCoy v. State, 25 Tex. 33, 78 Am. Dec. 520; McWhirt's Case, 3 Grat. (Va.) 594, 46 Am. Dec. 196.

From such conduct the law implies malice.[252]

241. Actual Intent to Kill.

(a) In General.—Whenever an accountable man kills another intentionally, he is guilty of murder with express malice unless the killing is justifiable or excusable,[253] or unless there are such circumstances of provocation as will reduce the homicide to manslaughter.[254] And if a man voluntarily and willfully does an act, the natural and probable consequence of which is to cause another's death, an intent to kill will be presumed.[255]

(b) Killing a Person not Intended.—The same is true if a man kills one person when he intends to kill another. If a man shoots at one person with intent to kill him,

---

[252] See Hadley v. State, 55 Ala. 31, Beale's Cas. 468. See, also, ante, § 62, and notes thereto.

[253] Post, § 266 et seq.

[254] Post, § 256 et seq.

[255] No principle is better settled in the criminal law than the principle that "a person must be presumed to intend to do that which he voluntarily and willfully does in fact do, and that he must intend all the natural, probable, and usual consequences of his own acts." Per Chief Justice Shaw in Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711. See ante, § 58; post, § 244.

and unintentionally kills another, or sets poison for one person and another drinks it and dies, it is murder with express malice of the person killed, even though he be a friend.[256] The intention need not even be to kill any particular person. It is murder to willfully shoot into a crowd, or to do any other dangerous act, with a general intent to kill or inflict great bodily harm.[257]

---

[256] 1 Hale, P. C. 466; Gore's Case, 9 Coke, 81 a, Beale's Cas. 209; Rex v. Plummer, 12 Mod. 627; Saunders' Case, 2 Plowd. 473; Golliher v. Com., 2 Duv. (Ky.) 163, 87 Am. Dec. 493; State v. Smith, 2 Strob. (S. C.) 77, 47 Am. Dec. 589, Beale's Cas. 468; State v. Raymond, 11 Nev. 98; Angell v. State, 36 Tex. 542, 14 Am. Rep. 380; Johnson v. State, 92 Ga. 36; Durham v. State, 70 Ga. 264; State v. Montgomery, 91 Mo. 52; Wareham v. State, 25 Ohio St. 601. See, also, Reg. v. Latimer, 16 Cox, C. C. 70, Beale's Cas. 217.

If two persons engage in a duel, and one accidentally kills a bystander, he is guilty of the murder of the bystander. State v. Raymond, 11 Nev. 98.

If a person attempts to poison one person, and unintentionally poisons and kills another, he is guilty of the murder of the latter. Saunders' Case, 2 Plowd. 474; State v. Fulkerson, Phil. (N. C.) 233.

[257] 1 Hawk. P. C. c. 29, § 12; 1 Hale, P. C. 275; Reg. v. Fretwell, Leigh & C. 443, 9 Cox, C. C.

242. Absence of Actual Intent to Kill—In General.

One may be guilty of murder at common law, though there may have been no actual intent to kill. Whether or not the offense is murder depends upon the nature and extent of the injury or wrong actually intended. It has been said that there are really only four cases in which an unintentional killing will constitute murder,—only four cases, that is, in which the law will imply malice where there was no actual intent to cause death. These are: (1) Cases in which there was an intent to inflict great bodily harm; (2) cases in which, conceding that there was no actual intent to injure, an act was done or duty omitted *willfully,* and without justification or excuse, the natural tendency of which was to cause death or great bodily harm; (3) cases in which the death was caused while engaged in the commission of, or attempt to commit, some other felony; and (4) cases in which the death was caused

---

471; Golliher v. Com., 2 Duv. (Ky.) 163, 87 Am. Dec. 493; Hopkins v. Com., 50 Pa. St. 9; Dunaway v. People, 110 Ill. 333, 51 Am. Rep. 686; Herrin v. State, 33 Tex. 638; Robinson v. State, 54 Ala. 86; Presley v. State, 59 Ala. 98.

while resisting a lawful arrest, or obstructing an officer in an attempt to suppress a riot or affray. A homicide unintentionally committed in doing an unlawful act not coming within any of these cases is generally involuntary manslaughter, [258] or not punishable at all, and is not murder.[259]

243. Intention to Inflict Great Bodily Harm.

All the authorities agree that, where death is caused, though unintentionally, by an act done with intent to inflict great bodily harm, and without justification or excuse, nor under circumstances reducing the homicide to manslaughter, it is murder. The intent shows such a disregard of consequences that the law implies malice, and it is no defense in such a case to say that there was no intent to kill.[260] Thus, killing a person by cruel torture, wantonly inflicted, and causing grievous bodily injury, is murder, even conceding that there was no intent to cause death.[261]

---

[258] Post, § 262 et seq.

[259] See Wellar v. People, 30 Mich. 16.

[260] See Fost. C. L. 259; 1 Hale, P. C. 491; State v. Hoover, 4 Dev. & B. (N. C.) 365, 34 Am. Dec.

244. Acts or Omissions Tending to Cause Death or Great Bodily Harm.

(a) In General.—It is also settled that, if death is caused by a willful act or omission, the natural tendency of which is to cause death or great bodily harm, the homicide is murder unless justifiable or excusable, or reduced to manslaughter by extenuating circumstances. An intent to kill or inflict great bodily harm will be implied as a matter of law, and without inquiry into the actual intent, on the principle that a man is to be presumed to have intended the natural and probable consequences of his voluntary acts. And it can make no difference in such a case that the act was done in sudden anger or in recklessness, and without an actual intent to kill.[262] Thus, it is murder at common law to kill a person by willfully riding an unruly and vicious horse into a

383; McWhirt's Case, 3 Grat. (Va.) 594, 46 Am. Dec. 196.

[261] State v. Hoover, 4 Dev. & B. (N. C.) 365, 34 Am. Dec. 383.

[262] Grey's Case, J. Kelyng, 64, Beale's Cas. 463; Reg. v. Serne, 16 Cox, C. C. 311, Beale's Cas. 465; Wellar v. People, 30 Mich. 16; State v. Smith, 2 Strob. (S. C.) 77, 47 Am. Dec. 589, Beale's Cas.

crowd,[263] or by willfully throwing a missile from the roof of a building into a crowded street.[264] So, if the warden of a prison unnecessarily takes a prisoner to a house in which there is a case of smallpox, knowing this fact, and knowing that the prisoner has never had the disease, and desires not to be exposed to it, and the prisoner catches the disease and dies, the warden is guilty of murder.[265] If a man deliberately shoots in the direction of another, who is within shooting distance, and kills him, he is guilty of murder, whether he intended to hit him or not. He cannot escape responsibility by showing that he merely intended to frighten him, or to cause his horse to throw him, etc.[266]

(b) Use of a Deadly Weapon.—In ac-

468; Hadley v. State, 55 Ala. 31, Beale's Cas. 469; Adams v. People, 109 Ill. 444, 50 Am. Rep. 617; McMillan v. State, 35 Ga. 54; State v. Hoover, 4 Dev. & B. (N. C.) 365, 34 Am. Dec. 383; Lewis v. State, 72 Ga. 164.

[263] 1 Hale, P. C. 476.

[264] Boles v. State, 9 Smedes & M. (Miss.) 284.

[265] Castell v. Bambridge, 2 Strange, 854, Beale's Cas. 420.

[266] State v. Smith, 2 Strob. (S. C.) 77, 47 Am. Dec. 589, Beale's Cas. 468.

cordance with this principle, the willful use of a deadly weapon upon another without justification, excuse or extenuating circumstances is universally recognized as showing malice. Thus, in a leading English case, a blacksmith, who in a fit of sudden anger struck his servant on the head with an iron bar, and killed him, was held guilty of murder, whether he actually intended to kill or not.[267]

To bring a case within the operation of this rule, the weapon must be a deadly one, either in its nature or in the manner in which it is used. Where the instrument used is not one likely to cause death or great bodily harm, as where one strikes another with his fist, or with a small stick or stone, or kicks him, the killing is manslaughter only, in the absence of an actual intent show-

---

[267] Grey's Case, J. Kelyng, 64, Beale's Cas. 463. And see McMillan v. State, 35 Ga. 54; Hadley v. State, 55 Ala. 31, Beale's Cas. 469; State v. Decklotts, 19 Iowa, 447; State v. Musick, 101 Mo. 260; Palmore v. State, 29 Ark. 248; Murphy v. People, 9 Colo. 439; People v. Barry, 31 Cal. 357; Beauchamp v. State, 6 Blackf. (Ind.) 300; Clem v. State, 31 Ind. 480; Davison v. People, 90 Ill. 221; Hurd v. People, 25 Mich. 405; Evans v.

ing a felonious purpose. A felonious intent in such cases will not be implied, but must be clearly proved.[268] A common as-

State, 44 Miss. 762; State v. Evans, 65 Mo. 574; State v. Thomas, 98 N. C. 599, 2 Am. St. Rep. 351; State v. Douglass, 28 W. Va. 297.

[268] Wild's Case, 2 Lewin, C. C. 214, Beale's Cas. 347 (where a man kicked another in ejecting him from his house); Turner's Case, 1 Ld. Raym. 143 (where a servant was hit on the head with a clog); Rex v. Kelly, 1 Mood. C. C. 113 (where it was uncertain whether the deceased was killed by a blow with the fist, which threw him upon a brick, or by a blow from a brick); Wellar v. People, 30 Mich. 15 (where a man struck his wife with his fist, and perhaps kicked her); State v. Jarrott, 1 Ired. (N. C.) 76 (where the blow causing death was given with a stick). See, also, Darry v. People, 10 N. Y. 120; Com. v. Fox, 7 Gray (Mass.) 585; State v. McNab, 20 N. H. 160; State v. Smith, 32 Me. 369; Williams v. State, 81 Ala. 1; Sylvester v. State, 71 Ala. 17.

A familiar illustration is in the case of death caused in a prize fight, which is held to be manslaughter only, unless an actual intent to kill or inflict great bodily harm is shown. 1 East, P. C. 270; Rex v. Murphy, 6 Car. & P. 103; Rex v. Hargrave, 5 Car. & P. 170. A stick or pocket knife may be a deadly weapon. It is so, if of such a size, or used in a way, as to be likely to cause death. Sylvester v. State, 71 Ala. 17; State v. West, 6 Jones (N. C.) 505.

sault which is not committed with a deadly weapon, nor under such circumstances as to naturally cause death or great bodily harm, will not supply the element of malice necessary to constitute murder, where there is no actual intent to kill. This distinction is clearly brought out by Judge Campbell in a Michigan case. "It is not necessary in all cases," he said, "that one held for murder must have intended to take the life of the person he slays by his wrongful act. It is not always necessary that he must have intended a personal injury to such person. But it is necessary that the intent with which he acted shall be equivalent in legal character to a criminal purpose aimed against life. Generally, the intent must have been to commit either a specific felony, or at least an act involving all the wickedness of a felony. And, if the intent be directly to produce a bodily injury, it must be such an injury as may be expected to involve serious consequences, either periling life or leading to great bodily harm. There is no rule recognized as authority which will allow a conviction of murder where a fatal result was not intended, unless the injury intended was

one of a very serious character, which might naturally and commonly involve loss of life or grievous mischief. Every assault involves bodily harm. But any doctrine which would hold every assailant as a murderer where death follows his act would be barbarous and unreasonable. * * * In general, it has been held that, where the assault is not committed with a deadly weapon, the intent must be clearly felonious, or the death will subject only to the charge of manslaughter. The presumption arising from the character of the instrument of violence is not conclusive either way, but, where such weapons are used as do not usually kill, the deadly intent ought to be left in no doubt. There are cases on record where death by kicking and beating has been held to warrant a verdict of murder, the murderous intent being found. But where there was no such intent, the ruling has been otherwise. * * * Where the weapon or implement used is not one likely to kill or to maim, the killing is held to be manslaughter, unless there is an actual intent which shows a felonious purpose." [269]

---

[269] Wellar v. People, 30 Mich. 16.

(c) Assault with the Hands or Feet Only.—Ordinarily, where an assault is made with the hands or feet only, and without a deadly weapon, and death results therefrom, the killing will not amount to murder, but will be manslaughter only.[270] But an assault may be made with the fists or feet in such a manner that the law will imply the malice necessary to constitute murder. Thus, if a strong man should strike or kick a very young infant, or should intentionally kick a grown person in a vital spot, as in the temple, the natural result of such an act would be to kill, or at the least to inflict great bodily harm, and the felonious intent should be presumed.[271]

(d) Setting Fire to a Building.—On the principle stated above, a man is guilty of murder if he willfully sets fire to a building in which he knows, or ought reasonably to know, there are human beings, and burns

---

[270] Wellar v. People, 30 Mich. 16; Wild's Case, 2 Lewin, C. C. 214, Beale's Cas. 347; and other cases above cited.

[271] McWhirt's Case, 3 Grat. (Va.) 594, 46 Am. Dec. 196. And see Murphy v. People, 9 Colo. 435.

them to death, though the building may not be a dwelling house, and he may not be guilty of arson.[272]

(e) Committing, or Attempting to Commit, an Abortion.—Since an attempt to procure an abortion by the use of instruments or drugs, where the woman is quick with child, is an unlawful act endangering her life, unintentionally causing her death in such an attempt is murder.[273] The same principle must apply where the woman is not quick with child, if the attempt is made in a way to endanger her life.[274]

245. Reckless and Wanton Acts.

To make an unintentional killing by the

---

[272] Reg. v. Serne, 16 Cox, C. C. 311, Beale's Cas. 465.

[273] 1 Hale, P. C. 429, 430; State v. Moore, 25 Iowa, 128, 95 Am. Dec. 776. See, also, Com. v. Keeper of Prison, 2 Ashm. (Pa.) 227; Ann v. State, 11 Humph. (Tenn.) 159; Com. v. Parker, 9 Metc. (Mass.) 263, 43 Am. Dec. 396.

[274] Smith v. State, 33 Me. 48, 54 Am. Dec. 607; Com. v. Jackson, 15 Gray (Mass.) 187.

If the attempt is not made in such a way as to endanger life, or threaten great bodily harm, the homicide is manslaughter only. See post, § 263 d.

use of a deadly weapon murder, the weapon need not be used in anger or ill-will. It is sufficient if it is used wantonly and recklessly in such a way as to manifestly endanger life. In a *South Carolina* case, the defendant had wantonly fired his pistol in the direction of a man riding along the road, with the intent, as the evidence tended to show, to cause the man's horse to throw him, and the shot killed a bystander. He claimed that he shot merely as a joke, but a conviction was sustained.[275]

246. Circumstances Showing an Abandoned and Malignant Heart.

It has often been laid down by writers on the criminal law and in the cases that, where the circumstances under which a man kills another show an abandoned and malignant heart, malice will be implied, and the killing is murder. This is a clearly settled principle of the common law,[276] and in

---

[275] State v. Smith, 2 Strob. (S. C.) 77, 47 Am. Dec. 589, Beale's Cas. 468. And see Golliher v. Com., 2 Duv. (Ky.) 163, 87 Am. Dec. 493; State v. Harris, 63 N. C. 1 (where a boy was killed by brutal and continuous chastisement by one in loco parentis).

[276] Com. v. Webster, 5 Cush. (Mass.) 295, 52

some states it is expressly declared by statute.[277] "If the act which produced the death," said the South Carolina court, "be attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit, the law, from these circumstances, will imply malice, without reference to what was passing in the prisoner's mind at the time he committed the act."[278]

In an Illinois case, in which the defendant was indicted for the murder of his wife, it appeared that he came home after he had been drinking, and at once began to abuse the members of his family. He threw a

---

Am. Dec. 711; Mayes v. People, 106 Ill. 306, 46 Am. Rep. 698; McMillan v. State, 35 Ga. 54; State v. Smith, 2 Strob. (S. C.) 77, 47 Am. Dec. 589, Beale's Cas. 468; State v. Hoover, 4 Dev. & B. (N. C.) 365, 34 Am. Dec. 383.

[277] Thus, in Illinois it is declared by statute that "malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." In Mayes v. People, 106 Ill. 306, 46 Am. Rep. 698, this was said to be merely declaratory of the common law.

[278] State v. Smith, 2 Strob. (S. C.) 77, 47 Am. Dec. 589, Beale's Cas. 468.

tin quart measure at his daughter, and then threw a heavy beer glass in the direction of his wife. The glass struck a lamp which she was carrying, causing it to explode, and she was burned to death. It was held that the jury could properly convict him of murder, if they believed from the evidence that the circumstances showed an abandoned and malignant heart on his part, though he may have had no actual intention to kill his wife.[279]

---

[279] Mayes v. People, 106 Ill. 306, 46 Am. Rep. 698. "It was utterly immaterial," said the court, "whether the plaintiff in error intended the glass should strike his wife, his mother-in-law, or his child, or whether he had any specific intent, but acted solely from general malicious recklessness, disregarding any and all consequences. It is sufficient that he manifested a reckless, murderous disposition,—in the language of the old books, 'a heart void of social duty, and fatally bent on mischief.' A strong man who will violently throw a tin quart measure at his daughter, —a tender child,—or a heavy beer glass, in a direction which he must know will probably cause it to strike his wife, sufficiently manifests malice in general to render his act murderous when death is the consequence of it. He may have intended some other result, but he is responsible for the actual result. When the act is,

The principle was also applied in a South Carolina case, where a man recklessly shot in the direction of another for the purpose, as he claimed, of making his horse throw him, and killed a bystander. He was convicted of murder.[280] Death resulting from severe torture, wantonly inflicted with the design of producing grievous suffering, will render the person causing the death guilty of murder, and not merely of manslaughter.[281]

247. Willful Omission to Perform a Legal Duty.

To be guilty of murder, a man need not necessarily do a positive act. The crime

---

in itself, lawful, or, even if unlawful, not dangerous in its character, the rule is different. In cases like the present, the presumption is the mind assented to what the hand did, with all the consequences resulting therefrom, because it is apparent he was willing that any result might be produced, at whatever of harm to others. In the other case, the result is accidental, and therefore not presumed to have been within the contemplation of the party, and so not to have received the assent of his mind."

[280] State v. Smith, 2 Strob. (S. C.) 77, 47 Am. Dec. 589, Beale's Cas. 468.

[281] State v. Hoover, 4 Dev. & B. (N. C.) 365, 34 Am. Dec. 383.

may be committed by mere nonfeasance, or omission to act at all, where there is a duty to act. Ordinarily, to cause death by criminal neglect of duty is manslaughter,[282] but if the omission is willful, and the natural tendency is to cause death or great bodily harm, and death ensues in consequence, it is murder. For example, if a father neglects to provide shelter and food and medical attendance for a child that is helpless and dependent upon him, where he has the means to do so, but not willfully, he is guilty of manslaughter only.[283] But if he does so willfully, and with reckless disregard of the consequences, and *a fortiori,* when he actually intends to cause death, he is guilty of murder.[284] And the same is true in any other case where a person willfully fails to provide for the necessities of a helpless person under his special charge, when he is under a legal duty to provide for him.[285] The

[282] Post, § 265.

[283] Post, § 265 d.

[284] Reg. v. Conde, 10 Cox, C. C. 547, Beale's Cas. 424. And see Lewis v. State, 72 Ga. 164, 53 Am. Rep. 835.

[285] See Reg. v. Bubb, 4 Cox, C. C. 455. And see post, § 265 d.

principle also applies where a switchman in the employ of a railroad company willfully omits to adjust a switch, and thereby causes a collision between trains, and the death of a passenger, or of another employe of the railroad company.[286]

In all cases, to render one responsible for a homicide by reason of mere nonfeasance, he must have omitted some duty which he was legally bound to perform. A man who sees a stranger drowning, or about to take poison by mistake, or about to commit suicide, is not under any legal duty, as distinguished from mere moral duty, to save him, and his omission to do so, whatever may be his motive, cannot render him guilty of murder.[287]

248. Homicide in the Commission of a Felony.

(a) In General.—At common law, malice was implied as a matter of law in every case of homicide while engaged in the commission of some other felony, and such a killing was murder whether death was intended or not. The mere fact that the party

---

[286] State v. O'Brien, 32 N. J. Law, 169.

[287] See post, § 265 e.

was engaged in the commission of a felony was regarded as sufficient to supply the element of malice.[288] On this principle, it was murder at common law to unintentionally kill another in committing, or attempting to commit, burglary, arson, rape, robbery, or larceny.[289] The doctrine has repeatedly been recognized and applied in this country,

---

[288] Fost. C. L. 258; 1 Hale, 475.

"Every felony, by the common law, involved a forfeiture of the lands or goods of the offender, upon a conviction of the offense; and nearly all offenses of that grade were punishable with death, with or without benefit of clergy. In such cases, therefore, the malicious and premeditated intent to perpetrate one kind of felony was, by implication of law, transferred from such offense to the homicide which was actually committed, so as to make the latter offense a killing with malice aforethought, contrary to the real fact of the case as it appeared in evidence." People v. Enoch, 13 Wend. (N. Y.) 159, 27 Am. Dec. 197, 200.

[289] Steph. Dig. Crim. Law, art. 223; Reg. v. Greenwood, 7 Cox, C. C. 404, Beale's Cas. 424; Reg. v. Serne, 16 Cox, C. C. 311, Beale's Cas. 465; State v. McNab, 20 N. H. 160; State v. Cooper, 13 N. J. Law, 361; State v. Shelledy, 8 Iowa, 477; Adams v. People, 109 Ill. 444, 50 Am. Rep. 617; Smith v. State, 33 Me. 48, 54 Am. Dec. 607; Com. v. Riley, Thatch. C. C. (Mass.) 471; Kennedy v.

and is to be regarded as still in force, except where it has been expressly abrogated by statute.[290]

The decisions at common law do not require that the act done shall have been of such a nature as to endanger life, or threaten great bodily harm, but the malice necessary to constitute murder is implied from the mere fact that the accused was committing, or attempting to commit, a felony. This was certainly the common-law doctrine. If it had been otherwise, the doctrine would have been altogether unnecessary, because the killing would be murder because of the *tendency* of the act,[291] without regard to its being done in the commission of a felony.[292] The doctrine, in so far as the commission of felonies not dangerous to life is concerned, has been criticised and

---

State, 107 Ind. 144, 57 Am. Rep. 99; Dill v. State, 25 Ala. 15.

[290] People v. Enoch, 13 Wend. (N. Y.) 159, 27 Am. Dec. 197.

[291] Ante, § 244.

[292] In Reg. v. Greenwood, 7 Cox, C. C. 404, Beale's Cas. 424, the accused had communicated a venereal disease to a woman in committing a rape upon her, and the court charged the jury

rendered doubtful, but it seems never to have been expressly repudiated.[293]

(b) Attempt to Commit Suicide.—Suicide was a felony at common law,[294] and therefore a homicide unintentionally com-

---

that the fact that he was committing a felony—the rape—made the homicide murder.

And in an earlier English case it was held that, if a man shot at a hen with intent to steal it, he was guilty of murder because of his felonious intent to steal the hen. Rex v. Plummer, 1 Hale, P. C. 475.

[293] In Reg. v. Serne, 16 Cox, C. C. 311, Beale's Cas. 465, decided in England in 1877, Stephen, J., expressed a doubt as to the soundness of the doctrine, and was of opinion that no court in England would follow the old cases to the full extent; but that, "instead of saying that any act done with intent to commit a felony, and which causes death, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death, done for the purpose of committing felony, which caused death, should be murder." As has been heretofore suggested, however, if the doctrine is thus restricted, it is unnecessary to regard the intent to commit a felony at all, as the dangerous tendency of the act, in itself, renders the killing murder. There can be no doubt that the broad doctrine was well established at common law, and whether it is to be still adhered to is a question for the legis-

mitted by a person in an attempt to commit suicide has been held to be murder.[295]

(c) Statutory Felonies.—It was said in a New York case that it necessarily follows, from this principle of the common law, that as often as the legislature creates new felonies, or raises offenses which were only misdemeanors at common law to the grade of felony, a new class of murders is created by the application of the principle to the case of a homicide committed while engaged in the perpetration of a newly-created felony; and on the other hand, when the legislature abolishes an offense which was a common-law felony, or reduces it to the grade of a misdemeanor, unintentional homicide by a person in the perpetration of such an act is

---

latures, and not for the courts, whose duty it is to enforce the law, and not to make it.

[294] Post, § 250.

[295] State v. Levelle, 34 S. C. 120.

In Com. v. Mink, 123 Mass. 422, 25 Am. Rep. 109, Beale's Cas. 206, a conviction of manslaughter was sustained where a person killed another in an attempt to commit suicide, and it was intimated that the conviction might perhaps have been of murder. This, however, was not decided.

no longer murder, but involuntary manslaughter.[296] The latter part of this proposition is no doubt true, but the first part is not so clear.

249. Homicide in Resisting Arrest or Obstructing an Officer.

The malice necessary to constitute murder at common law will also be implied where an officer or private person is killed by a man in resisting or obstructing a lawful attempt to arrest him or another, or even to execute civil process, though the killing may have been unintentional. The law implies malice in such a case because the party "set himself against the justice of the realm."[297]

---

[296] People v. Enoch, 13 Wend. (N. Y.) 159, 27 Am. Dec. 197.

[297] Yong's Case, 4 Coke, 40 a, Beale's Cas. 462; Rex v. Ford, Russ. & R. 329; Rex v. Baker, 1 Leach, C. C. 112, 1 East, P. C. 323; Roberts v. State, 14 Mo. 138, 55 Am. Dec. 97; Brooks v. Com., 61 Pa. St. 352, 100 Am. Dec. 645; Angell v. State, 36 Tex. 542, 14 Am. Rep. 380; Boyd v. State, 17 Ga. 194; Rafferty v. People, 69 Ill. 111; State v. Spaulding, 34 Minn. 361.

This rule does not apply where an arrest is attempted in such a wanton and menacing manner as to endanger life, or threaten great bodily harm, even though there may be a right to

The same principle applies where either an officer or a private person is killed by another, though unintentionally, in resisting his attempt to suppress a riot or affray.[298] Where a person, in resisting a lawful attempt to arrest him or to suppress a riot or affray, attempts to kill the officer, and by accident kills a third person, the killing is murder.[299]

As we shall see in treating of excusable homicide, a person may oppose force to force in resistance of an illegal attempt to arrest him, and if, in the conflict which ensues, he kills the officer to save himself from death or great bodily harm, the homicide is excusable.[300] And, as we shall see in treating of

---

make the arrest. Jones v. State, 26 Tex. App. 1, 8 Am. St. Rep. 454; note 302, infra.

[298] Yong's Case, 4 Coke, 40 a, Beale's Cas. 462; Tomson's Case, J. Kelyng, 66, Beale's Cas. 462; Rex v. Hodgson, 1 Leach, C. C. 6; State v. Ferguson, 2 Hill (S. C.) 619, 27 Am. Dec. 412.

When a private individual interposes in an affray to separate the combatants, he must give notice of his pacific intent, in order that the killing of him shall be murder, instead of manslaughter. State v. Ferguson, supra.

[299] Angell v. State, 36 Tex. 542, 14 Am. Rep. 380. And see Rex v. Hodgson, 1 Leach, C. C. 6.

[300] Post, § 277.

manslaughter, if a man kills another in the heat of passion caused by an illegal arrest, and not from malice, the homicide is voluntary manslaughter only.[301] Therefore, to make the killing of an officer or private individual in resisting an arrest murder, and not manslaughter merely, or excusable, these three things are necessary, namely: (1) Legal authority to make the arrest; (2) knowledge of that authority on the part of the person sought to be arrested, or knowledge of facts from which such knowledge may be imputed to him; and (3) an attempt to make the arrest in a legal manner.[302] As we shall see in another connection, if a homicide is committed in resisting an illegal arrest, not because of and under the influence of the provocation, and the heat of blood caused by the attempt to arrest, but from

---

[301] Post, § 260 c.

[302] See Tomson's Case, J. Kelyng, 66, Beale's Cas. 462, where it is held that the slayer must know, or have reason to know, that the person killed comes for the purpose of making the arrest, or suppressing the riot or affray. And see Drennan v. People, 10 Mich. 169; Creighton v. Com., 83 Ky. 142, 84 Ky. 103, 4 Am. St. Rep. 193, Beale's Cas. 339; Jones v. State, 26 Tex. App. 1, 8 Am.

malice, the killing is not manslaughter, but murder.[303]

(C) Suicide.

250. In General.—Suicide, or self-murder, was a felony at common law, and it is still regarded as unlawful and criminal, though it is no longer punished.

By the common law of England, suicide was considered a crime. The lands and goods of the offender were forfeited to the king, as in the case of other felonies, and his body was ignominiously buried in the highway. He was deemed a murderer of himself and a felon.[304] Suicide is no longer punishable either in England or in this country, but it has not for that reason ceased to be criminal.[305] One who persuades another to kill himself, and is present when he does so, is guilty of murder as principal

---

St. Rep. 454; Rex v. Thompson, 1 Mood. C. C. 80. Beale's Cas. 477; Mockabee v. Com., 78 Ky. 380; Fleetwood v. Com., 80 Ky. 1.

[303] Post, § 260 c.

[304] 3 Inst. 54; 1 Hale, P. C. 411; 2 Hale, P. C. 62; 1 Hawk. P. C. c. 27; 4 Bl. Comm. 189; State v. Levelle, 34 S. C. 120, 27 Am. St. Rep. 799; Com. v. Mink, 123 Mass. 422, 25 Am. Rep. 109, Beale's Cas. 206.

[305] Com. v. Mink, supra.

in the second degree, or, if absent, he is guilty as an accessary before the fact.[306] And if two persons agree to kill themselves together, and the means employed take effect upon one only, the survivor is guilty of murder of the one who dies.[307] An attempt to commit suicide is indictable, unless the statutes make it otherwise.[308] And if a person unintentionally kills another in attempting to commit suicide, he is guilty of manslaughter at least, and, according to a decision in South Carolina, of murder.[309]

---

[306] 4 Bl. Comm. 189; Rex v. Dyson, Russ. & R. 523; Com. v. Mink, supra; Com. v. Bowen, 13 Mass. 356, 7 Am. Dec. 154. But an accessary could not be punished because the principal could not be tried and convicted. Id.; Rex v. Russell, 1 Mood. C. C. 356; Reg. v. Leddington, 9 Car. & P. 79.

[307] Rex v. Tyson, Russ. & R. 523; Reg. v. Alison, 8 Car. & P. 418.

[308] Reg. v. Doody, 6 Cox, C. C. 463, Beale's Cas. 261; Reg. v. Burgess, Leigh & C. 258, 9 Cox, C. C. 247.

An attempt to commit suicide is not punishable under the Massachusetts statutes. Com. v. Dennis, 105 Mass. 162.

[309] Com. v. Mink, 123 Mass. 422, 25 Am. Rep. 109, Beale's Cas. 206; State v. Levelle, 34 S. C.

(D) Statutory Degrees of Murder.

251. In General.—In many of the states, murder has by statute been divided into degrees, according to the state of mind of the person committing the same, or of the circumstances attending its commission. In most states, murder in the first degree is where there is an actual intent to kill and deliberation or premeditation, or where the homicide is committed, though unintentionally, in the perpetration of certain felonies. Murder in the second degree includes other homicides which would be punished as murder at common law. The statutes, however, vary in the different states, and what is murder in the first degree in one state may be murder in the second degree in another. In some states there is a third degree of murder.

252. Particular Statutes.

At common law there were no degrees of murder. All homicide with malice aforethought, whether express or implied, was simply murder. And all murder was punished by death. It has been thought that many cases of homicide which the common law regarded as murder, and punished by death, should not be punished so severely, and in many of the states statutes have been enacted from time to time dividing murder

---

120, 27 Am. St. Rep. 799; ante, § 248 b; post, § 263 f.

into degrees, and punishing murder in the first degree by death, and murder in the second degree by confinement in the penitentiary for life or for a less term. The first state to pass such a statute was *Pennsylvania.* By the act of March 31, 1860, it was provided that all murder which should be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate, and premeditated killing, or which should be committed in the perpetration of, or attempt to perpetrate, any arson, rape, robbery, or burglary, should be deemed murder of the first degree; and all other kinds of murder should be deemed murder of the second degree.[310]

In *New York,* the statute is somewhat different. It is there declared that the killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed either from a deliberate and premeditated design to effect the death of the person killed, or of another; or by an act imminently dangerous to others, and

[310] Act. Pa. March 31, 1860, No. 375; Com. v. Drum, 58 Pa. St. 9.

evincing a depraved mind, regardless of human life, although without the premeditated design to effect the death of any individual; or without a design to effect death, by a person engaged in the commission of, or in an attempt to commit, a felony, either upon or affecting the person killed or otherwise; or when perpetrated in committing arson in the first degree. Such killing of a human being is murder in the second degree when committed with a design to effect the death of the person killed, or of another, but without deliberation or premeditation.[311]

In *Massachusetts,* the statute is not exactly like either of the above. It is there declared that murder committed with deliberately premeditated malice aforethought, or in the commission of, or in the attempt to commit, a crime punishable with death or imprisonment for life, or committed with extreme atrocity or cruelty, is murder in the first degree. Murder not appearing to be in the first degree is murder in the second degree.[312]

---

[311] Pen. Code N. Y. §§ 183, 184; Leighton v. People, 88 N. Y. 117.

[312] Pub. St. Mass. c. 202, §§ 1-3.

Effect of Statutes.—As a rule, these statutes have not otherwise changed the common law than by changing the punishment for murder committed under certain circumstances. What was murder at common law is still murder, though it may be only murder in the second degree, and therefore not a capital offense.[313]

253. Deliberation and Premeditation.

According to the better opinion, the terms "deliberation" and "premeditation" in these statutes are not synonymous. "Premeditation" implies merely "previous contrivance or formed design," and does not necessarily exclude acts on a sudden impulse.[314] "Deliberation" implies "reflection, however brief, upon the act before committing it; fixed and determined purpose, as distinguished from sudden impulse."[315] And it has been held, therefore, that a homicide committed on a sudden impulse, while it may be said to be premeditated because of

---

[313] See State v. Decklotts, 19 Iowa, 447; People v. Haun, 44 Cal. 96; Weighorst v. State, 7 Md. 442; Nye v. People, 35 Mich. 16.

[314] Cent. Dict. & Cyc. "Premeditation."

[315] Cent. Dict. & Cyc. "Deliberation."

the intent to kill, is not deliberate, and therefore does not constitute murder in the first degree.[316] There must be, before the killing, a fully formed purpose to kill, with so much time for deliberation and premeditation as to convince the jury that this purpose is not the immediate offspring of rashness and impetuous temper, and that the mind has become fully conscious of its own design.[317]

No Considerable Length of Time Necessary.—It is not necessary, however, to render a killing deliberate as well as premeditated, that the intention to kill shall have been entertained for any considerable length of time. It is enough if there is time for the mind to think upon or consider the act, and then determine to do it.[318] "An act,"

---

[316] Copeland v. State, 7 Humph. (Tenn.) 479; Com. v. Drum, 58 Pa. St. 9; Leighton v. People, 88 N. Y. 117, Beale's Cas. 472; Fahnestock v. State, 23 Ind. 231; Harris v. State, 36 Ark. 127.

[317] Com. v. Drum, 58 Pa. St. 9.

[318] Leighton v. People, 88 N. Y. 117, Beale's Cas. 472; Com. v. Drum, 58 Pa. St. 9; Atkinson v. State, 20 Tex. 522. And see Miller v. State, 54 Ala. 155; People v. Kiernan, 101 N. Y. 618; Binns v. State, 66 Ind. 428; State v. Williams, 69

said the New York court, "coexistent with and inseparable from a sudden impulse, although premeditated, could not be deemed deliberate, as when, under sudden and great provocation, one instantly, although intentionally, kills another. But the statute is not satisfied unless the intention was deliberated upon. If the impulse is followed by reflection, that is deliberation. Hesitation even may imply deliberation. So may threats against another and selection of means with which to perpetrate the deed. If, therefore, the killing is not the instant effect of impulse,—if there is hesitation or doubt to be overcome, a choice made as the result of thought, however short the struggle between the intention and the act,—it is sufficient to characterize the crime as deliberate and premeditated murder." [319]

254. Murder in the Second Degree.

An actual intent to kill is not necessary to

Mo. 110; State v. Wieners, 66 Mo. 13; Schlencker v. State, 9 Neb. 241; McDaniel v. Com., 77 Va. 281; Wright v. Com., 33 Grat. (Va.) 880; Hill v. Com., 2 Grat. (Va.) 594.

[319] Per Danforth, J., in Leighton v. People, 88 N. Y. 117, Beale's Cas. 472.

constitute murder in the second degree under the statutes, but it is sufficient if the circumstances are such that malice aforethought would be implied at common law, as where a deadly weapon is used without justification or excuse, and without such provocation as will suffice to reduce the offense to manslaughter.[320] As was stated in a previous section, the statutes have merely divided murder into degrees, for the purpose of fixing the punishment according to the heinousness of the offense, and have not otherwise changed the common-law rules.

(E) Manslaughter.

(1) IN GENERAL.

255. Definition.—Manslaughter is a homicide committed without justification or excuse, and without malice aforethought, express or implied.[321] It may be (1) voluntary, or (2) involuntary,—voluntary manslaughter being an intentional homicide, and involuntary manslaughter an unintentional homicide.

Nature of Offense.—The characteristic distinction between murder and manslaugh-

---

[320] State v. Decklotts, 19 Iowa, 447.

[321] 1 Hawk. P. C. c. 30, §§ 2, 3; 1 Hale. P. C. 466; Young v. State, 11 Humph. (Tenn.) 200; Steph. Dig. Crim. Law, art. 223.

ter is that in murder, as we have seen, the homicide is committed with malice aforethought, express or implied, while in manslaughter the killing is without malice. Although death may be intended, yet if a blow is given immediately after such provocation by the deceased as is reasonably calculated to excite sudden and angry passion and create heat of blood, this fact rebuts the presumption of malice, and, if there is no malice in fact, the offense is manslaughter only. It is unlawful and a felony, for the law does not excuse a man who allows his passion to cause him to kill his fellow man, but it is not so grievous an offense as a killing without provocation.

(2) VOLUNTARY MANSLAUGHTER.

256. Definition.—Voluntary manslaughter is an intentional homicide in sudden passion or heat of blood caused by a reasonable provocation, and not with malice aforethought.[322] The following principles apply to this grade of felonious homicide:

1. The killing is intentional.

2. It must be without malice.

---

[322] 1 Hawk, P. C. c. 30, § 3; 1 Hale, P. C. 466; State v. Ferguson, 2 Hill (S. C.) 619, 27 Am. Dec. 412; Creek v. State, 24 Ind. 151; Young v. State, 11 Humph. (Tenn.) 200; State v. Johnson, 1 Ired.

3. The provocation must be so great as to reasonably excite passion in an ordinary man, and cause him to act rashly and without reflection. By the weight of authority, the provocation is adequate—
   (a) Where the party is assaulted violently or with great rudeness.
   (b) When an unlawful attempt is made to arrest him.
   (c) When the killing is in mutual combat, provided no unfair advantage is taken by the slayer, and the occasion was not sought for the purpose of killing.
   (d) Where a husband sees his wife in an act of adultery, and kills her or her paramour. Under the old common law it was necessary that he should see the act, but this qualification has been repudiated in late cases.
   (e) Insulting words or gestures are not sufficient provocation.
   (f) Mere trespass against the land or goods of another is not sufficient.
   (g) By the weight of authority, perhaps, it is for the court to determine and instruct the jury as to the adequacy of a particular provocation. But on principle, and according to the better opinion, it is a question of fact for the jury, unless the provocation is clearly inadequate.

(N. C.) 354, 35 Am. Dec. 742; Brown v. Com., 86 Va. 466.

4. Provocation does not reduce a homicide to manslaughter—

(a) If the blood had actually cooled at the time the blow was given.

(b) If there was a reasonable time for cooling.

(c) Whether there was actual cooling, or a reasonable time for cooling, is ordinarily a question of fact for the jury.

257. Distinguished from Murder.

Voluntary manslaughter is distinguished from murder by the fact that it is committed, not with malice aforethought, express or implied, but in the heat of passion or heat of blood caused by reasonable provocation. When a man, in killing another, acts under the influence of sudden passion caused by a reasonable provocation, but not in necessary defense of his life, nor in order to prevent great bodily harm, the law does not excuse him because of the provocation; but it does not hold him guilty of murder. The law recognizes the fact that a man, when greatly provoked, will lose the control of his reason, and, under the influence of the passion and excitement caused by the provocation, resort to violence of which he would not be guilty

in the absence of passion. It therefore attributes the killing to the frailty of human nature, and not to malice, and, while it does not excuse the killing altogether, it reduces it to manslaughter.[323]

258. Intention to Kill.

There is *dictum* in some of the cases to the effect that the killing must have been unintentional to constitute manslaughter. But this is not true. A homicide without justification or excuse is not murder merely because there was an intention to kill. In all

---

[323] State v. Ferguson, 2 Hill (S. C.) 619, 27 Am. Dec. 412. And see the authorities cited in the note preceding.

"The true nature of manslaughter is that it is homicide mitigated out of tenderness to the frailty of human nature. Every man, when assailed with violence or great rudeness, is inspired with a sudden impulse of anger, which puts him upon resistance before time for cool reflection; and if, during that period, he attacks his assailant with a weapon likely to endanger life, and death ensues, it is regarded as done through heat of blood or violence of anger, and not through malice, or that cold-blooded desire for revenge which more properly constitutes the feeling, emotion, or passion of malice." Per Shaw, C. J., in Com. v. Webster, 5 Mass. 295, 52 Am. Dec. 711.

cases of voluntary manslaughter there is an actual intention to kill, or there is an intention to inflict great bodily harm, from which such an intent may be implied. It is manslaughter, and not murder, because there is no malice aforethought, not because of any absence of intention to kill.[324] As was said in a *Michigan* case, provocation reduces a homicide from murder to manslaughter, not because the law supposes that the passion caused thereby made the slayer unconscious

---

[324] State v. Hill, 4 Dev. & B. (N. C.) 491, 34 Am. Dec. 396; People v. Freel, 48 Cal. 436; Maher v. People, 10 Mich. 212, 81 Am. Dec. 781, Beale's Cas. 482; Creek v. State, 24 Ind. 151; Haile v. State, 1 Swan (Tenn.) 248; Young v. State, 11 Humph. (Tenn.) 200; Brown v. Com., 86 Va. 466.

"We nowhere find that the passion which in law rebuts the imputation of malice must be so overpowering as for the time to shut out knowledge, and destroy volition. All the writers concur in representing this indulgence of the law to be a condescension to the frailty of the human frame, which, during the furor brevis, renders a man deaf to the voice of reason, so that, although the act done was intentional of death, it was not the result of malignity of heart, but imputable to human infirmity." State v. Hill, 4 Dev. & B. (N. C.) 491, 34 Am. Dec. 396.

of what he was about to do, but because it presumes that it disturbed the sway of reason. It does not regard him as temporarily deprived of intellect, and, therefore, not an accountable being, but as one in whom the exercise of judgment was impeded by the violence of excitement, and accountable, therefore, as an infirm human being.[325]

259. Absence of Malice.

Voluntary manslaughter, though intentional, is a killing without malice aforethought. As was stated in defining the offense, it is the absence of malice that distinguishes it from murder. No provocation, however grievous, will reduce a voluntary homicide to manslaughter, if the circumstances show that the slayer acted, not in the heat of blood, but from malice.[326] "There can be no such thing in law as a killing with

---

[325] Per Christiancy, J., in Maher v. People, 10 Mich. 212, 81 Am. Dec. 781. To hold, as was said by Judge Christiancy in this case, that the reason must be entirely dethroned or overcome by passion, so as to destroy intelligent volition, would require such a degree of mental disturbance as is equivalent to utter insanity, and this would render the accused altogether innocent, whereas manslaughter is a very grievous felony, only a

malice, and also upon the *furor brevis* of passion; and provocation furnishes no extenuation, unless it produces passion. Malice excludes passion. Passion presupposes the absence of malice. In law they cannot coexist." [327] Illustrations of this principle will be shown in dealing with particular provocations in the following sections.

260. The Provocation.

(*a*) *Sufficiency in General.*—To reduce a homicide from murder to manslaughter, the provocation must be adequate in the eye of the law, and to be so it must be so great as to reasonably excite passion and heat of

---

little short of murder. See, also, Young v. State, 11 Humph. (Tenn.) 200.

[326] 1 Hawk. P. C. c. 11, § 18; McWhirt's Case, 3 Grat. (Va.) 594, 46 Am. Dec. 196; State v. Ferguson, 2 Hill (S. C.) 619, 27 Am. Dec. 412; Brooks v. Com., 61 Pa. St. 352, 100 Am. Dec. 645; State v. Hill, 4 Dev. & B. (N. C.) 491, 34 Am. Dec. 396; State v. Lane, 4 Ired. (N. C.) 113; State v. McCants, 1 Speers (S. C.) 384; Huggett's Case, J. Kelyng. 59, Beale's Cas. 474; State v. Scott, 4 Ired. (N. C.) 409, 42 Am. Dec. 148; Slaughter v. Com., 11 Leigh (Va.) 681.

[327] Per Gaston, J., in State v. Johnson, 1 Ired. (N. C.) 354, 35 Am. Dec. 742. And see, to the same effect, Brown v. Com., 86 Va. 466.

blood. Passion without adequate provocation is not enough.[328] If a man unreasonably allows his passion to control his judgment, he is responsible to the full extent for the consequences of his acts. The line which distinguishes provocations which will mitigate the offense from those which will not cannot, in the nature of things, be clearly defined. Reasonableness is the test. The law contemplates the case of a reasonable man,—an ordinarily reasonable man,—and requires that the provocation shall be such as might naturally induce such a man, in the anger of the moment, to commit the deed.[329]

---

[328] State v. Ferguson, 2 Hill (S. C.) 619, 27 Am. Dec. 412; Maher v. People, 10 Mich. 212, 81 Am. Dec. 781, Beale's Cas. 482; State v. Shippey, 10 Minn. 223, 88 Am. Dec. 70; People v. Sullivan, 7 N. Y. 399; Preston v. State, 25 Miss. 383; Campbell v. State, 23 Ala. 44; and other cases cited in the notes following.

[329] Reg. v. Welsh, 11 Cox, C. C. 336, Beale's Cas. 479; Maher v. People, 10 Mich. 212, 81 Am. Dec. 781, Beale's Cas. 482; State v. Ferguson, 2 Hill (S. C.) 619, 27 Am. Dec. 412; Flanagan v. State, 46 Ala. 703; State v. Decklotts, 19 Iowa, 447, 455; Silgar v. People, 107 Ill. 563; Thomas v. State, 61 Miss. 60; People v. Freeland, 6 Cal. 96.

In State v. Ferguson, supra, it was said: "Those

The rule is that reason should, at the time of the act, be disturbed by passion to an extent which might render ordinary men, of fair average disposition, liable to act rashly, and without reflection, and from passion rather than judgment.[330]

(b) Assault and Battery.—Every man, when assailed with violence or great rudeness, is inspired with a sudden impulse of anger, which puts him upon resistance be-

---

provocations which are in themselves calculated to produce a high degree of resentment, and which ordinarily superinduce a great degree of violence, when compared with those that are slight and trivial, and from which a great degree of violence does not usually follow, may serve as a general outline to mark the distinction, and, when applied with judgment and discretion, will usually lead to correct results."

[330] Per Christiancy, J., in Maher v. People, 10 Mich. 212, 81 Am. Dec. 781, Beale's Cas. 482. It was said in this case: "In determining whether the provocation is sufficient or reasonable, ordinary human nature, or the average of men recognized as men of fair average mind and disposition, should be taken as the standard, unless the person whose guilt is in question be shown to have some peculiar weakness or infirmity of temper, not arising from wickedness of heart, or cruelty of disposition."

fore time for cool reflection; and if, during that period, he attacks his assailant with a deadly weapon, even with intent to kill, and death ensues, it is regarded as done through heat of blood, and, unless malice is shown by the circumstances, the killing is only manslaughter.[331] To reduce the killing to manslaughter, the assault must have been with violence or great rudeness, and must have been reasonably calculated to excite passion and heat of blood. A mere touching of the person of another, as by intentionally pushing against him, or a light touch with a small cane, though technically an assault and battery, would not be sufficient.[332]

---

[331] Stedman's Case, Fost. C. L. 292, Beale's Cas. 477; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Atkins v. State, 16 Ark. 568; Hurd v. People, 25 Mich. 405; Stewart v. State, 78 Ala. 436; Ex parte Warrick, 73 Ala. 57; People v. Turley, 50 Cal. 469; Bird v. State, 55 Ga. 317; State v. Levigne, 17 Nev. 435; State v. Curry, 1 Jones (N. C.) 280; State v. Blunt, 91 Mo. 503; Draper v. State, 4 Baxt. (Tenn.) 246.

[332] See Honesty v. Com., 81 Va. 283; State v. Ferguson, 2 Hill (S. C.) 619, 27 Am. Dec. 412; Stewart v. State, 78 Ala. 436; State v. Anderson, 4 Nev. 265; State v. Barfield, 8 Ired. (N. C.) 344. In State v. Ferguson, supra, it was held to be

Malice.—In no case will an assault, however violent, mitigate the offense, if there was malice. And malice may well be inferred if the retaliation was outrageous in its nature, either in the manner or the circumstances of it, and beyond all proportion to the provocation, "because," as it has been said, "it manifests rather a diabolical depravity than the frailty of human nature."[333]

(c) Unlawful Arrest.—We have seen that a homicide committed in resisting a lawful arrest is murder, even when unintentional.[334] *A fortiori,* it is murder where the killing is intended. It is otherwise, how-

---

murder, and not manslaughter, where the only provocation was that the deceased had, without using unnecessary violence, separated the accused from a person whom he was beating.

Throwing a stick or club at another, without hitting him, is not such provocation as will reduce a killing to manslaughter. State v. Scott, 4 Ired. (N. C.) 409, 42 Am. Dec. 148. See, also, Thompson v. State, 55 Ga. 47.

[333] State v. Ferguson, 2 Hill (S. C.) 619, 27 Am. Dec. 412. And see McWhirt's Case, 3 Grat. (Va.) 594, 46 Am. Dec. 196; Brooks v. Com., 61 Pa. St. 352, 100 Am. Dec. 645.

[334] Ante, § 249.

ever, even where there is an intent to kill, if the arrest is unlawful for some reason, as where it is attempted without a warrant, or under a void warrant, when a warrant is necessary, or outside of the officer's jurisdiction, or in an unlawful manner. In such a case, the attempt to arrest is so grievous an assault that it is regarded as sufficient provocation to reduce a homicide in resisting it to manslaughter.[335]

Malice.—In these, as in other cases, the blow must be given in heat of blood, and by

---

[335] 1 Hale, P. C. 457; Rex v. Thompson, 1 Mood. C. C. 80, Beale's Cas. 477; Creighton v. Com., 83 Ky. 142, 84 Ky. 103, 4 Am. St. Rep. 193, Beale's Cas. 339; Jones v. State, 26 Tex. App. 1, 8 Am. St. Rep. 454; Com. v. Carey, 12 Cush. (Mass.) 246; Roberts v. State, 14 Mo. 138, 55 Am. Dec. 97; Jones v. State, 14 Mo. 409; Drennan v. People, 10 Mich. 169; Rafferty v. People, 72 Ill. 37; State v. Oliver, 2 Houst. (Del.) 585; Dias v. State, 7 Blackf. (Ind.) 20, 39 Am. Dec. 448; People v. Burt, 51 Mich. 199; Poteete v. State, 9 Baxt. (Tenn.) 261, 40 Am. Rep. 90.

Where an officer, attempting to make an arrest on suspicion of a felony, is asked for his authority, and says that he has a warrant, but refuses to produce it, and gives no explanation whatever, but makes the arrest with circumstances of violence, and the person arrested resists, and kills

reason thereof. If the circumstances show that there was malice, the mere fact that there was provocation will not reduce the offense from murder.[336]

Illegal Arrest of a Felon.—There is *dictum* in a Pennsylvania case to the effect that if a man who is actually guilty of a felony is pursued for the purpose of arrest, and, when overtaken, kills his pursuer, he is

---

the officer, it is not a case of murder, but of manslaughter. Drennan v. People, 10 Mich. 169.

Strangers may interfere to prevent an unlawful arrest or detention of a person. Such arrest or detention, it has been held, is provocation, not only to the person arrested or detained, but also to strangers, and if the person who is making the arrest, or is guilty of the detention, is killed without malice, the homicide is manslaughter only. Reg. v. Tooley, 2 Ld. Raym. 1296. But see Reg. v. Adey, 1 Leach C. C. 206.

[336] Brooks v. Com., 61 Pa. St. 352, 100 Am. Dec. 645; Roberts v. State, 14 Mo. 138, 55 Am. Dec. 97; State v. Spaulding, 34 Minn. 361; State v. McNally, 87 Mo. 644.

Thus, if a man who has committed a crime kills an officer who is attempting to arrest him, not through heat of blood, but because of his consciousness of guilt, and for the purpose of escaping, he is guilty of murder, not manslaughter, though the attempt to arrest him may have been illegal. Brooks v. Com., supra.

guilty of murder, though the arrest may have been illegal. While this is not laid down in any of the books as an invariable rule of law, it is obvious that it must generally, if not always, apply. "An innocent man is unconscious of guilt," said the court, "and may stand on his own defense. When assailed under a pretense which is false, his natural passion rises, and he turns upon his assailant with indignation and anger. To be arrested without cause is to the innocent great provocation. If, in the frenzy of passion, he loses his self-control and kills his assailant, the law so far regards his infirmity that it acquits him of malicious homicide. But this is not the condition of the felon. Conscious of his crime, he has no just provocation—he knows his violation of law, and that duty demands his capture. The passion is wickedness, and resistance is crime. Neither reason nor law accords to him that sense of outrage which springs into a mind unconscious of offense, and makes it stand in defense of personal liberty. On the contrary, fear settles upon his heart, and, when he uplifts his hand, the act is prompted by wicked hate and fear of punishment. * * *

A sense of guilt cannot arouse honest indignation in the breast, and therefore cannot extenuate a cruel and willful murder to manslaughter." [337]

(d) Mutual Combat.—The same rules apply to homicide in mutual combat, the killing being attributed to heat of blood occasioned by the combat, and not to malice, though it be intentional. The doctrine in such cases has been thus stated: If two persons meet, not intending to quarrel, and angry words suddenly arise, and a conflict springs up, in which blows are given on both sides, without much regard to who is the assailant, it is a mutual combat; and if no unfair advantage is taken at the outset, and the occasion was not sought for the purpose of gratifying malice, and one of them seizes a weapon and strikes a fatal blow, it is regarded as homicide in the heat of blood, and manslaughter.[338]

---

[337] Brooks v. Com., 61 Pa. St. 352, 100 Am. Dec. 645.

[338] Lord Morley's Case, Kelyng, 53, Beale's Cas. 473; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Rex v. Ayes, Russ. & R. 166; Rex v. Snow, 1 Leach, C. C. 151, 1 East, P. C. 244;

Malice.—The killing in such cases, to constitute manslaughter instead of murder, must have been without malice. If the circumstances show that the accused sought the occasion or provoked the difficulty for the purpose of killing the deceased, he is guilty of murder, for this shows malice.[339] And the

State v. Curry, 1 Jones (N. C.) 280; State v. Moore, 69 N. C. 267; McCoy v. State, 8 Ark. 451; Copeland v. State, 7 Humph. (Tenn.) 479; Cates v. State, 50 Ala. 166; People v. Sullivan, 7 N. Y. 396; State v. Levigne, 17 Nev. 435; People v. Sanchez, 24 Cal. 17; Stiles v. State, 57 Ga. 183; Tate v. State, 46 Ga. 148; State v. Partlow, 90 Mo. 608; State v. McDonnell, 32 Vt. 491.

[339] If a man commences an affray with the preconceived purpose of killing his adversary, or of doing him great bodily harm, and does kill him, nothing that may have occurred during the affray can reduce the killing to manslaughter. The malice of the first assault, notwithstanding any violence with which it may have been returned, communicates its character to the act of killing, and the accused cannot be heard to say that the homicide was by reason of uncontrollable passion, caused by the violence of the deceased, and not by reason of the previous malice. State v. Hill, 4 Dev. & B. (N. C.) 491, 34 Am. Dec. 396; State v. Lane, 4 Ired. (N. C.) 113; State v. McCants, 1 Speer (S. C.) 384; Huggett's Case, Kelyng, 59, Beale's Cas. 474; State v. Martin, 2 Ired. (N. C.)

same is true if he took an unfair advantage at the outset, as by secretly arming himself, in anticipation of the conflict.[340] But in cases of homicide in mutual combat, it makes no difference that the accused struck the first blow, if the occasion was unpremeditated, and at the commencement of the contest the parties were on equal terms.[341] Nor does it make any difference that dangerous weapons were used from the beginning, if the combat was unpremeditated, and both parties were equally armed and ready, or that, in the

101; Ex parte Nettles, 58 Ala. 268; Tate v. State, 46 Ga. 148. See, also, State v. Howell, 9 Ired. (N. C.) 485; State v. Smith, 24 W. Va. 814; State v. Matthews, 80 N. C. 417; State v. Underwood, 57 Mo. 40.

[340] 1 East, P. C. 242, 243; Fost. C. L. 295; Whiteley's Case, 1 Lewin, C. C. 173; State v. Scott, 4 Ired. (N. C.) 409, 42 Am. Dec. 148; State v. McCants, 1 Speers (S. C.) 384; Slaughter v. Com., 11 Leigh (Va.) 681; State v. Hildreth, 9 Ired. (N. C.) 429, 51 Am. Dec. 364; Ex parte Nettles, 58 Ala. 268.

[341] State v. McCants, 1 Speers (S. C.) 384.

Thus, in State v. Hill, 4 Dev. & B. (N. C.) 491, 34 Am. Dec. 396, where the accused made a simple assault upon the deceased, and the deceased, to avenge the blow, attacked the accused with a knife, and severely wounded him, and the

course of the combat, the accused used against an unarmed adversary a deadly weapon, if it was hastily snatched in the heat of passion, and not clearly provided for the purpose.[342]

Previous Encounters and Threats.—When a man kills another in mutual combat, it is not to be presumed that he acted with malice merely because he was actuated by malice in a former encounter with the deceased, and because he had quarreled with the deceased, and made threats against him. "Certainly, where two persons have formerly fought on malice, and are apparently reconciled, and fight again on a fresh quarrel, it shall not be intended that they were moved by the old grudge, unless it so appear from the circumstances of the affair." [343]

---

accused instantly, and in a transport of passion thus excited, and without previous malice, killed the deceased, it was held a case of manslaughter. See, also, State v. Levigne, 17 Nev. 435.

[342] State v. McCants, 1 Speers (S. C.) 384; State v. Levigne, 17 Nev. 435.

[343] 1 Hawk. P. C. c. 13, § 30; Copeland v. State, 7 Humph. (Tenn.) 479; State v. Hill, 4 Dev. & B. (N. C.) 491, 34 Am. Dec. 396; State v. Hildreth, 9 Ired. (N. C.) 429, 51 Am. Dec. 364.

Duel.—A homicide committed in a deliberate duel, however fairly the combat may be conducted, is not manslaughter, but murder. "The punctilios of false honor the law regards as furnishing no excuse for homicide. He who deliberately seeketh the blood of another, in compliance with such punctilios, acts in open defiance of the laws of God and of the state, and with that wicked purpose which is termed 'malice aforethought.' "[344]

(e) Sight or Knowledge of Wife's Adultery.—It has long been settled that if a man sees his wife in the act of adultery, this is sufficient provocation to reduce to manslaughter an instant killing either of the wife or of her paramour.[345] According to the old authorities the husband must see the act. If he kills on suspicion, however well founded, or on information, he is guilty of murder. And there are late cases also holding this

---

[344] State v. Hill, 4 Dev. & B. (N. C.) 491, 34 Am. Dec. 396.

[345] 1 Hale, P. C. 486; Fost. C. L. 296; 1 East, P. C. 234, 251; 4 Bl. Comm. 192; Reg. v. Rothwell, 12 Cox, C. C. 145, Beale's Cas. 481; Hooks v. State, 99 Ala. 166; and cases cited in the notes following.

doctrine.[346] The distinction, however, is not reasonable. For example, it is not reasonable to hold a husband guilty of murder, instead of manslaughter, in killing his wife's paramour, if he did so under the influence of passion immediately after their separation, and with conclusive evidence of their guilt. And there are some well-considered cases holding that it is a question for the jury in such cases whether the provocation was sufficient.[347]

---

[346] Reg. v. Fisher, 8 Car. & P. 182; Reg. v. Kelly, 2 Car. & K. 814; State v. John, 8 Ired. (N. C.) 330, 49 Am. Dec. 396; State v. Samuel, 3 Jones (N. C.) 74, 64 Am. Dec. 596; McWhirt's Case, 3 Grat. (Va.) 594, 46 Am. Dec. 196. See, also, Shufflin v. People, 62 N. Y. 229; Biggs v. State, 29 Ga. 723; Sawyer v. State, 35 Ind. 83; State v. Avery, 64 N. C. 608; State v. Harman, 78 N. C. 519; People v. Horton, 4 Mich. 69.

In State v. Samuel, supra, it was held that the fact that the husband knows that the other man has previously been in the habit of adulterous intercourse with his wife, and that he believes, when he kills him, that he is then accompanying her for that purpose, will not reduce the homicide to manslaughter.

[347] Maher v. People, 10 Mich. 212, 81 Am. Dec. 781, Beale's Cas. 482; Reg. v. Rothwell, 12 Cox, C.

Malice.—Even the sight of his wife's adultery does not reduce a homicide by the husband to manslaughter if he committed the deed with malice, and not under the influence of indignation and passion caused by the sight.[348]

(*f*) *Adultery with Sister.*—It was held in Pennsylvania that where a man detects another in bed with his sister under circumstances showing clearly that she has been committing adultery, and kills the man, there is no such provocation as will reduce the homicide to manslaughter.[349] According to the better opinion, however, the question in such a case would be for the jury.[350]

(*g*) *Insulting Words and Gestures.*—It is well settled, as a general rule, that no words of reproach or contemptuous gestures, however insulting, will constitute sufficient provocation to reduce a homicide to manslaughter.[351] But this rule does not apply where,

C. 145, Beale's Cas. 481; Hooks v. State, 99 Ala. 166.

[348] See the cases above cited. And see ante, § 259.

[349] Lynch v. Com., 77 Pa. St. 205.

[350] Post, § 260 i.

[351] 1 Hale, P. C. 456; Fost. C. L. 290; Lord More-

because of insulting words or gestures, persons become suddenly heated and engage in mutual combat, and the person insulted slays the other under the influence of passion caused by the other's blows, and not because of the insulting words or gestures. In such a case it is manslaughter in mutual combat.[352] And there is authority for saying that there may be circumstances under which words alone may constitute sufficient provo-

---

ly's Case, Kelyng. 53, Beale's Cas. 473; Reg. v. Rothwell, 12 Cox, C. C. 145, Beale's Cas. 481; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Preston v. State, 25 Miss. 383; U. S. v. Wiltberger, 3 Wash. C. C. 515, Fed. Cas. No. 16,738; State v. Carter, 76 N. C. 20; Taylor v. State, 48 Ala. 180; Ex parte Brown, 65 Ala. 446; People v. Butler, 8 Cal. 435; Malone v. State, 49 Ga. 210; Bird v. State, 55 Ga. 317; People v. Turley, 50 Cal. 469; Johnson v. State, 27 Tex. 758; State v. Evans, 65 Mo. 574; Green v. Com., 83 Pa. St. 75; State v. Martin, 30 Wis. 216.

"This rule governs every case where the party killing upon such provocation made use of a deadly weapon, or otherwise manifested an intention to kill, or do some great bodily harm." 1 East, P. C. c. 5, § 20.

[352] Lord Morley's Case, Kelyng. 53, Beale's Cas. 473; State v. Hill, 4 Dev. & B. (N. C.) 491, 34 Am. Dec. 396. Ante, § 260 d.

cation, if the jury think that they were such as to reasonably excite uncontrollable passion.[353]

In Texas the statute makes it manslaughter, and not murder, where a man kills another because of insulting words or conduct towards a female relative, if the killing occurs as soon as the parties meet after knowledge of the insult.[354]

(*h*) *Trespass upon Land or Goods.*—It is also well settled that no mere trespass upon the land or goods of another is sufficient to reduce an intentional killing to manslaughter. If one uses a deadly weapon upon another to prevent a mere trespass upon his property, and kills him, he is guilty of murder.[355]

---

[353] Reg. v. Rothwell, 12 Cox, C. C. 145, Beale's Cas. 481; post, § 260 i.

[354] See Richardson v. State, 9 Tex. App. 612; Orman v. State, 22 Tex. App. 604, 58 Am. Rep. 662; Simmons v. State, 23 Tex. App. 653.

[355] State v. Shippey, 10 Minn. 223, 88 Am. Dec. 70; Com. v. Drew, 4 Mass. 396; People v. Horton, 4 Mich. 67; Beauchamp v. State, 6 Blackf. (Ind.) 299; State v. Vance, 17 Iowa, 138; Monroe v. State, 5 Ga. 85; Hayes v. State, 58 Ga. 35; Simpson v. State, 59 Ala. 1, 31 Am. Rep. 1; Oliver v. State, 17 Ala. 587; Lambeth v. State, 23 Miss. 322.

It will be shown in a subsequent section that a man may kill another to prevent a felony attempted by violence or surprise, as burglary or robbery. These are more than mere trespasses, and the homicide is justifiable.[356] So, as we shall see, a man may sometimes kill to prevent an entry into his dwelling house.[357]

A man may also oppose force to force to prevent a mere trespass if he does not use a deadly weapon, or use unnecessary force, and if it becomes necessary, during the encounter, to kill in order to save himself from death or great bodily harm, he will be excused.[358] In such a case, if he should kill the other during the conflict, not in order to save himself from death or great bodily harm, but because of passion caused by the other's blows, it would be manslaughter in mutual combat.[359] If he should kill him from malice in such case, it would be murder.[360]

---

[356] Post, § 268.

[357] Post, § 287.

[358] Post, § 277.

[359] Com. v. Drew, 4 Mass. 391; Claxton v. State, 2 Humph. (Tenn.) 181; ante, § 260 d.

[360] Ante, §§ 259, 260d.

(*i*) *Question of Law or Fact.*—The weight of authority in *England* is to the effect that it is for the court to determine in the abstract whether a particular act of provocation is adequate, and to instruct the jury as a matter of law that it is or is not, and that it is for the jury to say whether such provocation was given, whether it caused heat of blood, and whether the homicide was committed in the heat of blood.[361] And there are cases in this country to the same effect.[362] The soundness of this view is more than doubtful, and there are well-considered cases both in England and in this country to the effect that the adequacy of any act of provocation to arouse passion in an ordinarily reasonable man, which all agree to be the test,

[361] Reg. v. Fisher, 8 Car. & P. 182; Reg. v. Kelly, 2 Car. & K. 814.

Thus, in Reg. v. Fisher and Reg. v. Kelly, supra, the jury were instructed, as a matter of law, that a wife's adultery was not sufficient provocation to the husband, where he did not see the act.

[362] State v. John, 8 Ired. (N. C.) 330. In this case it was held as a matter of law that a wife's adultery was not sufficient provocation to the husband where he did not see the act.

is essentially a question for the jury, unless it is so clearly inadequate as to admit of no reasonable doubt upon any theory.[363] As was

[363] Reg. v. Welch, 11 Cox, C. C. 336, Beale's Cas. 479; Reg. v. Rothwell, 12 Cox, C. C. 145, Beale's Cas. 481; Maher v. People, 10 Mich, 212, 81 Am. Dec. 781, Beale's Cas. 482; Hooks v. State, 99 Ala. 166.

In Maher v. People, supra, it was said by Judge Christiancy: "It is doubtless, in one sense, the province of the court to define what, in law, will constitute a reasonable or adequate provocation, but not, I think, in ordinary cases, to determine whether the provocation proved in the particular case is sufficient or reasonable. This is essentially a question of fact, and to be decided with reference to the peculiar facts of each particular case. As a general rule, the court, after informing the jury to what extent the passions must be aroused, and reason obscured, to render the homicide manslaughter, should inform them that the provocation must be one, the tendency of which would be to produce such a degree of excitement and disturbance in the minds of ordinary men; and if they should find that it did produce that effect in the particular instance, and that the homicide was the result of such provocation, it would give it the character of manslaughter."

It was further said: "Besides the consideration that the question is essentially one of fact, jurors, from the mode of their selection, coming from the various classes and occupations of so-

said by Judge Christiancy in a *Michigan* case, "Provocations will be given without reference to any previous model, and the passions they excite will not consult the precedents." [364]

---

ciety, and conversant with the practical affairs of life, are much better qualified to judge of the sufficiency and tendency of a given provocation, and much more likely to fix, with some degree of accuracy, the standard of ordinary human nature, than the judge, whose habits and course of life give him much less experience of the working of passion in the actual conflicts of life."

In the case from which these quotations are taken, the evidence showed that the accused shot the deceased when laboring under great excitement. His counsel offered to prove, for the purpose of showing provocation, that the deceased had committed adultery with the wife of the accused within half an hour prior to the shooting, that the accused saw them come out of the woods, and followed them, and, after they had separated, went into a saloon after the deceased, and instantly shot him, and that, a few minutes before he entered the saloon, a friend told him that his wife and the deceased had committed adultery in the woods the day before. According to the old authorities, this would not show adequate provocation, as the accused did not see the act (ante, § 269e), and the trial court excluded the evidence. On writ of error after a conviction of murder, the judgment was reversed on the ground that it was

261. Cooling of Blood.

(*a*) *In General.*—Not only must the provocation have been of such a nature as might reasonably excite passion and overthrow reason, but the homicide must have been committed before the passion subsided and the blood cooled, and before the lapse of a reasonable time for cooling. If the blood of the accused actually did cool before he gave the fatal blow, it is clearly a case of murder, however short the time between the provocation and the blow. And if the circumstances show that he reflected, as where it appears that he sought some advantage, or took time to choose some convenient place for fighting, or to strike at a particular vital spot, actual cooling may well be inferred, for these circumstances show the exercise of reason and judgment.[365]

---

for the jury to say whether there was sufficient provocation, and that the evidence should have been admitted.

[364] Maher v. People, 10 Mich. 212, 81 Am. Dec. 781, Beale's Cas. 482.

[365] See 1 East, P. C. 252; Rex v. Oneby, 2 Ld. Raym. 1485. "If, from any circumstance whatever," said East, "it appear that the party reflected, deliberated, or cooled any time before the

(*b*) *Reasonable Time for Cooling.*—It is not necessary, however, in all cases, to show that the blood actually did cool, in order to make out a case of murder. It is enough to show that there was a reasonable time for cooling, for the law requires that men shall act reasonably in controlling their passions.[366] The reasonable time for cooling is

fatal stroke given, or if, in legal presumption, there was time or opportunity for cooling, the killing will amount to murder." 1 East, P C. 252.

[366] 1 East, P. C. 252; Rex v. Oneby, 2 Ld. Raym. 1485; Lord Morely's Case, Kelyng, 53, Beale's Cas. 473; State v. McCants, 1 Speers (S. C.) 384 (one of the best cases on this point to be found in the reports); State v. Hill, 4 Dev. & B. (N. C.) 491, 34 Am. Dec. 396; Kilpatrick v. Com., 31 Pa. St. 198; McWhirt's Case, 3 Grat. (Va.) 594, 46 Am. Dec. 196; Hawkins v. State, 25 Ga. 207, 71 Am. Dec. 166; State v. Shippey, 10 Minn. 223, 88 Am. Dec. 70.

"'Was he cool?' means, not was there in fact a gentle flowing of the blood, which had been hurried in its circulation, but means, was there, in law, malice in his act; and the reasonable time then is not mere evidence of actual cooling, or cooling in its popular sense, but is, in itself, a circumstance which, in law, stands in place of actual cooling, and is equally significant of malice. He who has received a sufficient legal provocation, such as might have mitigated to manslaughter a

the time within which an ordinarily reasonable man would cool under like circumstances.[367] In applying this test, all the circumstances attending the homicide are to be taken into consideration, including the nature and extent of the provocation, the physical and mental constitution of the accused, his condition in life and peculiar situation at the time of the affair, his education and habits, and his conduct, manner, and conversation throughout the affair. "In a word, all pertinent circumstances may be considered, and the time in which an ordinary man, in like circumstances, would have cooled, is the reasonable time."[368]

(c) *Question of Law or Fact.*—Some of

---

mortal blow proceeding from it and given instantly, would not be less than a murderer if he should remain in apparently undiminished fury for a length of time unreasonable under the circumstances, and then kill." State v. McCants, 1 Speers (S. C.) 384.

[367] State v. McCants, 1 Speers (S. C.) 384; Kilpatrick v. Com., 31 Pa. St. 198.

Where, after men had been engaged in mutual combat, they ceased to fight, and one of them went to some distance after a weapon, and then returned and killed the other, it was held that the homicide was murder, whether the party actually

the cases hold that whether there was reasonable time for cooling is a question of law to be decided by the court upon consideration of the length of time and all the other circumstances found by the jury on a special verdict, or else to be given to the jury in the court's charge.[369] This, however, is wrong. The proper practice is to leave the question to be determined by the jury as a question of fact, under proper instructions, and by a general verdict. Whether, under all the circumstances, there was time for the passions of an ordinary man to cool must depend upon the nature of man and the laws of the human mind, as well as upon the nature and circumstances of the provocation, and in ordinary cases is essentially a question of fact for the jury.[370]

---

cooled or not. Hawkins v. State, 25 Ga. 207, 71 Am. Dec. 166.

[368] State v. McCants, 1 Speers (S. C.) 384. See State v. Moore, 69 N. C. 267.

[369] Rex v. Oneby, 2 Ld. Raym. 1485; Reg. v. Fisher, 8 Car. & P. 182; State v. McCants, 1 Speers (S. C.) 384.

[370] Rex v. Hayward, 6 Car. & P. 157; Rex v. Lynch, 5 Car. & P. 324; Maher v. People, 10 Mich. 212, 81 Am. Dec. 781, Beale's Cas. 482; Hooks v. State, 99 Ala. 166.

(3) INVOLUNTARY MANSLAUGHTER.

262. Definition.—Involuntary manslaughter is a homicide committed unintentionally, but without excuse, and not under such circumstances as to raise the implication of malice.[371] It may arise—

1. **From malfeasance, or the doing of a criminal act not amounting to a felony, nor naturally tending to cause death or great bodily harm.**
2. **From misfeasance, or the doing of a lawful act with gross negligence.**
3. **From nonfeasance, or the omission to perform a legal duty under circumstances showing gross negligence.**

The absence of an intent to kill or to inflict great bodily harm distinguishes involuntary manslaughter from voluntary manslaughter. It is distinguished from murder in that there is no malice, either express or implied,—that is, no actual intent to kill or inflict great bodily harm, nor circumstances from which malice will be implied, as the doing of an act dangerous to life, or the commission of a felony, or resistance of a lawful arrest. It is distinguished from

---

[371] See Wild's Case, 2 Lewin, C. C. 214, Beale's Cas. 347; Reg. v. Towers, 12 Cox, C. C. 530, Beale's Cas. 425; State v. Benham, 23 Iowa, 154, 92 Am. Dec. 417; Keenan v. State, 8 Wis. 132; People v. Stubenvoll, 62 Mich. 329.

excusable homicide by accident by the fact that the killing results from doing a criminal act.

263. Malfeasance.

(*a*) *In General.*—An unintentional homicide in the doing of a criminal act not amounting to a felony, nor naturally tending to cause death or great bodily harm, is generally manslaughter.[372]

As we have seen, it is murder to unintentionally kill another in committing, or attempting to commit, some felony, as burglary, rape, arson, or robbery, or by doing an act which has a natural tendency to cause death or great bodily harm, because in such cases the law implies malice from the nature of the act.[373]

If the act is not of such a nature, but is criminal,—that is, a misdemeanor,—and is *malum in se* and not merely *malum prohibitum,* the law does not excuse the act al-

---

[372] Reg. v. Towers, 12 Cox, C. C. 530, Beale's Cas. 245; Reg. v. Bradshaw, 14 Cox, C. C. 83, Beale's Cas. 146; State v. Benham, 23 Iowa, 154, 92 Am. Dec. 417. See also People v. Steubenvoll, 62 Mich. 329; Rex v. Sullivan, 7 Car. & P. 641.

[373] Ante, §§ 244, 248.

together as an accident, but, because the act was criminal, punishes the homicide as manslaughter.[374]

(*b*) *Assaults, Breaches of the Peace, and Unlawful Games.*—If one assaults another, but not in a way to naturally cause death or great bodily harm, he is guilty of a criminal act, and if death ensues, though contrary to his intention and wish, the homicide is manslaughter.[375] So, if men engage in a prize

---

[374] See the cases cited in note 372, supra, and in the notes following. And see post, § 263 g.

[375] Wild's Case, 2 Lewin, C. C. 214, Beale's Cas. 347; Fray's Cas, 1 East, P. C. 236, Beale's Cas. 477; Wigg's Case, 1 Leach, C. C. 378; Reg. v. Towers, 12 Cox, C. C. 530, Beale's Cas. 425; People v. Seubenvoll, 62 Mich. 329. And see Reg. v. Bruce, 2 Cox, C. C. 262, Beale's Cas. 202.

In Reg. v. Towers, supra, this principle was applied where a man assaulted a woman who was nursing a child, and thereby caused the child to go into convulsions, and die.

It is manslaughter if, on a sudden quarrel between two persons, a blow intended for one of them accidentally falls upon and kills a third person. Rex v. Brown, 1 Leach, C. C. 135.

It is murder if the assault is made in a way to manifestly endanger life, or threaten great bodily harm, as when it is made with a deadly weapon, though without intent to kill. Ante, § 244.

fight under such circumstances as to constitute a breach of the peace, and one of them unintentionally kills the other, it is manslaughter at common law because of the breach of the peace.[376] The same is true of a homicide unintentionally caused in an affray.[377] And it is manslaughter to unintentionally kill another in an unlawful game or sport, as in a game of football played in such a manner as to be dangerous.[378] If a game is played in such a way as to make it likely to cause death, it is unlawful, and this principle applies, notwithstanding it is played according to established rules.[379]

(*c*) *Immoderate Correction of Child, Pu-*

---

[376] See Ward's Case, 1 East, P. C. 270; Reg. v. Knock, 14 Cox, C. C. 1.

If, by statute in the particular jurisdiction, prize fighting is lawful, the homicide is excusable as an accident. Post, § 274. If prize fighting should be made a felony by statute, the homicide, according to the common-law doctrine, would be murder. Ante, § 248.

[377] Reg. v. Knock, 14 Cox, C. C. 1.

[378] Reg. v. Bradshaw, 14 Cox, C. C. 83, Beale's Cas. 146. If the game or sport is lawful, the homicide is excusable. Post, § 274.

[379] Reg. v. Bradshaw, 14 Cox, C. C. 83, Beale's Cas. 146.

pil or Apprentice.—It is lawful for a parent or one in *loco parentis* to correct his child, and, if the correction does not exceed the bounds of moderation, the unintentional killing of the child will be excused as an accident.[380] If the correction is immoderate, however, either because of the instrument used, or because of the extent of the punishment, it becomes an assault and battery, and, if death ensues in consequence, it is a case of manslaughter.[381] Of course, in determining whether the correction was moderate or not, the age of the child must be taken into consideration.[382] The same principle applies to the correction of a pupil by his teacher, or an apprentice by his master, where the right to correct at all is recognized.[383]

---

[380] Ante, § 274b.

[381] 1 Hale, P. C. 455; Fost. C. L. 262, Beale's Cas. 185, 315; Reg. v. Griffin, 11 Cox, C. C. 402, Beale's Cas. 315; Rex v. Cheeseman, 7 Car. & P. 455; State v. Field, 70 Iowa, 196; Com. v. Randall, 4 Gray (Mass.) 36; post, 274b.

[382] Reg. v. Griffin, 11 Cox, C. C. 402, Beale's Cas. 315.

[383] Grey's Case, Kelyng, 64, Beale's Cas. 463; Reg. v. Hopley, 2 Fost. & F. 202; ante, § 211; post, § 275b.

(*d*) *Attempting or Procuring an Abortion.*—If a person attempts to procure an abortion under such circumstances, or in such a manner, as to inflict serious injury on the woman, and endanger her life, and she dies by reason thereof, the homicide, as we have seen, is murder.[384] If the attempt is not made in such a way as to inflict serious injury or endanger life, the homicide is manslaughter, for the attempt to procure an abortion is unlawful.[385]

(*e*) *Riots.*—A riot is not a felony, so as to make an unintentional homicide while engaged in a riot murder.[386] But such a homicide is manslaughter, if there is no intention to kill or inflict great bodily harm, for the riot is a misdemeanor.[387]

[384] Ante, § 244e.

[385] Reg. v. Gaylor, Dears. & B. C. C. 288; Yundt v. People, 65 Ill. 372; People v. Olmstead, 30 Mich. 431; Willey v. State, 46 Ind. 363; People v. Clark, 7 N. Y. 385; State v. Glass, 5 Or. 73; Com. v. Railing, 113 Pa. St. 37.

[386] Ante, § 248.

[387] 1 Whart. Crim. Law, §§ 326, 398; Rex. v. Murphy, 6 Car. & P. 103; Brennan v. People, 15 Ill 511; Sloan v. State, 9 Ind. 565; Patten v. People. 18 Mich. 314; State v. Jenins, 14 Rich. (S. C.) 215.

(*f*) *Attempt to Commit Suicide.*—One who, in attempting to commit suicide, unintentionally kills a bystander, is guilty of manslaughter at least, because an attempt to commit suicide is criminal and *malum in se,* though no longer punishable.[388]

(*g*) *Acts Merely Mala Prohibita.*—To constitute involuntary manslaughter by malfeasance, the act done must be *malum in se,* and not merely *malum prohibitum.* For this reason it was held in a *Massachusetts* case, referred to in a previous section, that a person was not guilty of criminal assault and battery in driving over a man in the street, merely because he was driving at a rate of speed prohibited by a city ordinance, where he was not driving so recklessly as to be guilty of criminal negligence.[389] This case would apply, of course, if the man had been killed and the indictment had been for manslaughter. There is some authority ap-

[388] Com. v. Mink, 123 Mass. 422, 25 Am. Rep. 109, Beale's Cas. 206; ante, § 250.

In South Carolina it has been held .murder. State v. Levelle, 34 S. C. 120, 27 Am. St. Rep. 799.

[389] Com. v. Adams, 114 Mass, 323, 19 Am. Rep. 362, Beale's Cas. 204; ante, §§ 59, 71.

parently against this view. In a *Kentucky* case a man was held guilty of manslaughter without regard to any question of negligence, where he deliberately fired his pistol within the limits of a city in violation of an ordinance, and unintentionally killed a bystander.[390] This case may perhaps be sustained, however, on the ground that the act of firing the pistol was wanton and *malum in se.*

(*h*) *Act Constituting a Mere Civil Wrong.*—The *dictum* in many of the cases is broad enough to make it manslaughter to unintentionally kill another while engaged in committing a mere civil wrong or tort, but this is not the law. To have this effect the act must, at least, be a misdemeanor. In a leading English case it was said that the mere fact of a person committing a civil wrong against another ought not to be used as an incident which is a necessary

[390] Sparks v. Com., 3 Bush. (Ky.) 111, 96 Am. Dec. 196. And it was held that the same result follows if he expresses an intention to discharge his pistol in violation of law, and it is accidentally discharged in drawing it. Sparks v. Com., supra.

step in a criminal case, apart from the question of criminal negligence, and it was therefore held that the mere fact of a person wrongfully taking up a box from a refreshment stall on a sea pier, and wantonly throwing it into the sea, thereby unintentionally causing the death of a person who was bathing in the sea, was not *per se,* apart from the question of negligence, sufficient to make him guilty of manslaughter.[391]

264. Misfeasance.

(*a*) *In General.*—The unintentional killing of another by gross negligence in the doing of a lawful act is manslaughter at common law.[392] If a man does a lawful act in a lawful manner, and unintentionally kills another, the homicide is excusable as an accident.[393] And it is also excusable if he was negligent, provided his negligence was not gross under the circumstances. Negligence rendering a man liable in a civil action for

---

[391] Reg. v. Franklin, 15 Cox, C. C. 163, Beale's Cas. 203. Compare Rex v. Sullivan, 7 Car. & P. 641.

[392] Fost. C. L. 262, Beale's Cas. 185; Reg. v. Salmon, 14 Cox, C. C. 494, Beale's Cas. 189.

[393] Post, § 274.

damages does not necessarily render him criminally responsible. To have this effect it must be gross.[394]

(*b*) *Careless Driving or Bicycling, etc.*—It is perfectly lawful for a man to drive along a frequented thoroughfare, but he must take care not to injure others in doing so. If he is guilty of gross negligence in the manner of his driving, and runs over and kills another, he is guilty of manslaughter.[395] What is gross negligence in such cases must depend upon the circumstances. Proper speed on a country road might be excessive speed on a city street, and proper speed in the daytime might be grossly excessive at night. Precisely the same principle must necessarily apply to death caused by care-

[394] Rex. v. Long, 4 Car. & P. 398, 423; Reg. v. Spilling, 2 Mood. & R. 107; Reg. v. Spencer, 10 Cox, C. C. 525; Rex v. Williamson, 3 Car. & P. 635.

[395] Reg. v. Swindall, 2 Car. & K. 230, 2 Cox, C. C. 141, Beale's Cas. 167; Reg. v. Longbottom, 3 Cox, C. C. 439; Reg. v. Dalloway, 2 Cox, C. C. 273, Beale's Cas. 165; Reg. v. Kew, 12 Cox, C. C. 355, Beale's Cas. 165; Belk v. People, 125 Ill. 584; Crum v. State, 64 Miss. 1, 60 Am. Rep. 44; Lee v. State, 1 Cold. (Tenn.) 62; White v. State, 84 Ala. 421.

less bicycling, or carelessness in the use of automobiles and other conveyances.

(*c*) *Careless Handling of Deadly Weapons, Poisons, and Other Agencies.*—A man may also be guilty of manslaughter because of carelessness in the handling of a deadly weapon. It is perfectly lawful to shoot at a mark in the absence of statutory prohibition; yet, if a man negligently takes such a position that the bullets must go in the direction of a habitation, he will be guilty of manslaughter if they happen to kill a person.[396] And the same is true in any other case of culpable negligence in handling a deadly weapon.[397] The principle also ap-

[396] Reg. v. Salmon, 14 Cox, C. C. 494, Beale's Cas. 189.

[397] In State v. Hardie, 47 Iowa, 647, 29 Am. Rep. 496, the accused, for the purpose of frightening a woman, snapped a pistol at her, and it went off, and killed her. The weapon had been in the house for five years, and unsuccessful attempts had repeatedly been made to fire it off, and it was clear from the evidence that the accused did not think it would go off. He was convicted of manslaughter, however, and the conviction was sustained on the ground that he was guilty of gross negligence. See, also, Rampton's Case, Kelyng, 41; People v. Fuller, 2 Park. Cr. R. (N. Y.) 16;

plies to negligence in handling poisons and other dangerous drugs.[398] A building contractor is guilty of manslaughter if, by using poor and defective materials, he constructs a building in such a manner as to render it dangerous, and it collapses because of such negligence on his part, and causes a death.[399]

(*d*) *Negligence of Physicians and Surgeons.*—If a physician or surgeon honestly

---

Reg. v. Campbell, 11 Cox, C. C. 323; Reg. v. Jones, 12 Cox, C. C. 628; Sparks v. Com., 3 Bush (Ky.) 111, 96 Am. Dec. 196; People v. Steubenvoll, 62 Mich. 329; State v. Emery, 78 Mo. 77, 47 Am. Rep. 92; State v. Roane, 2 Dev. (N. C.) 58; State v. Vines, 93 N. C. 493, 53 Am. Rep. 466; Robertson v. State, 2 Lea (Tenn.) 239, 31 Am. Rep. 602; State v. Vance, 17 Iowa, 138; People v. Fuller, 2 Park. Cr. R. (N. Y.) 16.

[398] Reg. v. Crook, 1 Fost. & F. 521; Reg. v. Markuss, 4 Fost. & F. 356; Reg. v. Gaylor, Dears. & B. C. C. 288, 7 Cox, C. C. 253; Com. v. Thompson, 6 Mass. 134; Rice v. State, 8 Mo. 561; State v. Center, 35 Vt. 378.

A person causing the death of a child by giving it spirituous liquors in a quantity unfit for its tender age is guilty of manslaughter. Rex v. Martin, 3 Car. & P. 211.

[399] People v. Buddensieck, 103 N. Y. 487, 57 Am. Rep. 766.

and in good faith performs an operation, or administers a drug, and the patient dies therefrom, he is not guilty of manslaughter, merely because he made a mistake, or did not have sufficient skill.[400] But if the death was due to gross negligence, inattention, or ignorance, he is guilty.[401] By the weight of authority, the same rules apply to one who assumes to act as a physician or surgeon without being regularly licensed.[402]

---

[400] 1 Hale, P. C. 428; 4 Bl. Comm. 197; Reg. v. Chamberlain, 10 Cox, C. C. 486, Beale's Cas. 187; Reg. v. Spencer, 10 Cox, C. C. 525; Rex v. Williamson, 3 Car. & P. 635; Rex v. Van Butchell, 3 Car. & P. 629; Rex v. Long, 4 Car. & P. 398; Reg. v. Macleod, 12 Cox, C. C. 534; Com. v. Thompson, 6 Mass. 134; Rice v. State, 8 Mo. 561; post, § 274.

[401] Rex v. Long, 4 Car. & P. 423; Rex v. Spiller, 5 Car. & P. 333; Reg. v. Chamberlain, 10 Cox, C. C. 486, Beale's Cas. 187; Reg. v. Macleod, 12 Cox, C. C. 534; Reg. v. Spilling, 2 Mood. & R. 107; Reg. v. Spencer, 10 Cox, C. C. 525; State v. Hardister, 38 Ark. 605, 42 Am. Rep. 5; Com. v. Pierce, 138 Mass. 165, 52 Am. Rep. 264. See, also, Rex. v. Senior, 1 Mood. C. C. 346; Reg. v. Markuss, 4 Fost. & F. 356; Reg. v. Crook, 1 Fost. & F. 521.

[402] 1 Hale, P. C. 429; Rex v. Van Butchell, 3 Car. & P. 629; Rex v. Long, 4 Car. & P. 398, 423; Reg. v. Chamberlain, 10 Cox, C. C. 486, Beale's Cas. 187. And see the cases cited in the notes preceding.

265. Nonfeasance.

(*a*) *In General.*—The unintentional killing of another by omission to perform a legal duty owing to him, under circumstances showing inexcusable negligence, or failure to exercise reasonable diligence, is manslaughter.[403] Whether a homicide by mere nonfeasance, or omission to perform a duty, is murder or manslaughter, depends upon whether the omission was willful or not. If it was not willful, but due to gross negligence, the homicide is manslaughter; but if it was willful, and the natural consequence was to cause death, the homicide is murder.[404] Whether such a homicide is manslaughter or excusable homicide depends upon whether the omission was due to gross negligence. If the negligence was not gross

---

[403] Reg. v. Haines, 2 Car. & K. 368, Beale's Cas. 170; Reg. v. Lowe, 3 Car. & K. 123, Beale's Cas. 192; Reg. v. Hughes, 7 Cox, C. C. 301.

The captain of a vessel is guilty of manslaughter, at least, if he negligently fails to stop the vessel, and lower a boat, so as to rescue a seaman who has fallen overboard. U. S. v. Knowles, 4 Sawy. 517, Fed. Cas. No. 15,540.

[404] Ante, § 247.

under the circumstances, the homicide is excusable.[405]

(*b*) *Negligence of Persons in Charge of Railroad Trains, Machinery, Appliances, etc.*—The above principle has repeatedly been applied to persons in charge of railroad trains and steamboats, and other persons charged with duties in connection therewith, or with other kinds of machinery and appliances. In the case of a collision between railroad trains, and the death of a passenger or employe of the company caused by the negligence of the engineer or of a switchman or train dispatcher, if his omission was willful, and, *a fortiori,* if he actually intended the collision, he is guilty of murder. If the omission was not due to gross negligence or inattention, the homicide is excusable as an accident. If it was due to gross negligence or inattention, it is manslaughter.[406]

(*c*) *Negligence in Connection with Mines.*—The same principle applies when a mine

---

[405] Post. § 274.

[406] State v. O'Brien. 32 N. J. Law. 169: Reg. v. Pargeter. 3 Cox. C. C. 191.

A person in charge of a steamboat was held guilty of manslaughter where death was caused

owner or a superintendent or employe in a mine, charged with the duty of ventilating the mine, or of attending the engine for drawing up the miners, fails to properly perform his duty, and thereby causes the death of a miner. If his neglect was due to failure to exercise reasonable diligence, he is guilty of manslaughter.[407]

(*d*) *Neglect of Children and Other Dependent Persons.*—The doctrine under consideration has repeatedly been applied in case of the death of a child or other helpless person, caused by the neglect of those charged

by his leaving the boat in the charge of a person who was incompetent. Reg. v. Lowe, 3 Car. & K. 123, 4 Cox, C. C. 449.

Failure of the officers of a vessel, or of an employe on a street car, to keep a lookout, will render them guilty of manslaughter if death is caused thereby. Reg. v. Lowe, supra; Reg. v. Spence, 1 Cox, C. C. 352; Com. v. Metropolitan R. Co., 107 Mass. 236.

[407] Reg. v. Haines, 2 Car. & K. 368, Beale's Cas. 170; Reg. v. Lowe, 3 Car. & K. 123, Beale's Cas. 192.

Failure of employe in a mine to plank up a shaft, when he is charged with this duty, will render him guilty of manslaughter if death is caused thereby. Reg. v. Hughes, 7 Cox, C. C. 301.

with his custody and care. It is well settled that if a parent, being able, fails through culpable negligence to provide food, shelter, medical attendance and other necessaries for his dependent child, and thereby causes the child's death, he is guilty of manslaughter at least.[408] If the omission is willful, he is guilty of murder.[409] The same principle applies if a husband, by such neglect, causes the death of a sick and helpless wife,[410] or in any other case in which a person has undertaken, whether for a compensation or not, to attend and care for one who is helpless.[411]

---

[408] Reg. v. Conde, 10 Cox, C. C. 547, Beale's Cas. 424; Reg. v. Downes, 13 Cox, C. C. 111, Beale's Cas. 195. See Rex v. Friend, Russ. & R. 20, Beale's Cas. 190.

Omission to call in a physician from religious and conscientious scruples is elsewhere considered. See ante, § 65.

[409] Ante, § 247.

[410] Reg. v. Plummer, 1 Car. & K. 600; State v. Smith, 65 Me. 257.

[411] Reg. v. Instan [1893] 1 Q. B. 450, Beale's Cas. 198; Reg. v. Nicholls, 13 Cox, C. C. 75, Beale's Cas. 193.

"Every person under a legal duty, whether by contract or by law, or by the act of taking charge, wrongfully or otherwise, of another person, to provide the necessaries of life for such other

Inability to provide the necessary food, medical attendance, etc., is a sufficient excuse.[412] But such a case must be reported to the public authorities, if there are poor laws providing for public aid to sick or helpless paupers.[413]

There is no liability if the person neglected, whether wife, child, servant, or stranger, is able to help himself, and avoid the consequences of the neglect.[414]

(*e*) *There must be a Duty to Act.*—To render one responsible for a homicide because of mere nonfeasance, he must have omitted some legal duty which he owed to deceased. Failure to perform acts of mercy

---

person, is criminally responsible for the neglect of that duty, if the person to whom the duty is owing is, from age, health, insanity, or any other cause, unable to withdraw himself from the control of the person from whom it is due, but not otherwise." Steph. Dig. Crim. Law, art. 213.

[412] Reg. v. Hogan, 2 Den. C. C. 277, 5 Cox, C. C. 255; Reg. v. Philpott, 6 Cox, C. C. 140.

[413] Reg. v. Mabbett, 5 Cox, C. C. 339.

[414] Rex v. Friend, Russ. & R. 20; Reg. v. Shepherd, Leigh & C. 147, 9 Cox, C. C. 123; Reg. v. Waters, 2 Car. & K. 864, 1 Den. C. C. 356; Reg. v. Smith, Leigh & C. 607, 10 Cox, C. C. 82.

or mere moral obligations is not enough.[415] For a stranger to neglect to give warning so as to prevent a collision between railroad trains, or to prevent a man from taking poison, or for him to fail to rescue a drowning person or feed a starving child, would not render him guilty of manslaughter, for he is only under a moral obligation to interfere in such cases, and the law does not undertake to punish for failure to perform moral obligations. There must have been a legal duty, and it must have been owing to the deceased.[416]

---

[415] 1 Whart. Crim. Law, §§ 329, 330; Connaughty v. State, 1 Wis. 159; Burrell v. State, 18 Tex. 713.

[416] In Reg. v. Smith, 11 Cox, C. C. 210, Beale's Cas. 192, the accused was employed by the owner of a tramway, which crossed a public highway, to warn travelers on the highway of the approach of trucks on the tramway, but the owner of the tramway was under no legal duty to warn travelers. Under these circumstances, it was held that the accused owed no duty to the travelers, and that his failure to give warning, whereby the death of a traveler was caused, did not make him guilty of manslaughter. If a statute had imposed a duty to give warning, it would have been otherwise.

Failure to provide food or medical attendance for a starving or sick and helpless person

Knowledge of Facts Giving Rise to Duty.—It is also necessary, in cases of this character, that the accused shall have known of the facts making it his duty to act, for a man cannot be said to neglect to perform a duty unless he knows of the condition of things which requires performance at his hands.[417] In some cases, however, it may be a part of his duty to inform himself of the facts so that a failure to do so through culpable negligence would render him responsible.

---

or child does not render one guilty of homicide, if he is under no legal duty to do so. Thus, in Rex v. Smith, 2 Car. & P. 449, it was held that a person was not responsible for allowing his idiot brother to die of want, though living in the same house, where it did not appear that he had undertaken to support him. See, also, Reg. v. Pelham, 8 Q. B. Div. 959; Reg. v. Shepherd, Leigh & C. 147, 9 Cox, C. C. 123; Reg. v. Saunders, 7 Car. & P. 277.

This principle does not apply where a person has specially undertaken to supply the wants of a helpless person, or has put him beyond the reach of relief from others; and it makes no difference that there is no relationship between the parties. Reg. v. Smith, Leigh & C. 607, 10 Cox, C. C 82.

[417] State v. Smith, 65 Me. 257.

(F) Justifiable and Excusable Homicide.

(1) JUSTIFIABLE HOMICIDE IN GENERAL.

266. Definition.—Justifiable homicide is the necessary killing of another in the performance of a legal duty, or the exercise of a legal right, the slayer not being at all in fault. A homicide is justifiable, so that no blame whatever attaches, in the following cases:

1. **When a person convicted of a capital offense, and sentenced to death by a court of competent jurisdiction, is executed by the proper officer in accordance with the sentence.**
2. **When a person is necessarily killed, either by a peace officer or by a private person, in order to prevent him from committing a felony by violence or surprise.**
3. **When a homicide is necessarily committed, either by a peace officer or by a private person, in suppressing a riot.**
4. **When a person is necessarily killed in effecting an arrest for a felony committed by him, or in preventing his escape after he has been arrested and is in custody.**
5. **When a person who is feloniously assaulted, and who is himself without fault, kills his assailant to save himself from death or great bodily harm.**

267. Execution of Criminals.

One of the clearest cases of justifiable homicide is where an officer executes one who has been convicted of a capital offense

and sentenced to death.[418] To be justifiable, the homicide must be in accordance with the law, and in strict conformity with the sentence. "The law must require it," says Blackstone, "otherwise it is not justifiable; therefore, wantonly to kill the greatest of malefactors, a felon or a traitor, attainted or outlawed, deliberately, uncompelled, and extrajudicially, is murder.[419] And further, if judgment of death be given by a judge not authorized by lawful commission, and execution is done accordingly, the judge is guilty of murder.[420] Also, such judgment, when legal, must be executed by the proper officer or his appointed deputy. If another person doth it of his own head, it is held to be murder, even though it be the judge himself.[421] It must, further, be executed *servato juris ordine;* it must pursue the sentence of the court. If an officer beheads one

---

418 4 Bl. Comm. 178; Fost. C. L. 267. Beale's Cas. 311.

419 4 Bl. Comm. 178; 1 Hale, P. C. 497.

420 4 Bl. Comm. 178; 1 Hale, P. C. 497; 1 Hawk. P. C. 70.

421 4 Bl. Comm. 178.

who is adjudged to be hanged, or *vice versa*, it is murder." [422]

268. Homicide to Prevent a Felony.

(*a*) *In General.*—It is a well-settled principle of the common law that any person, whether he be a peace officer or merely a private individual, may and should kill another, if necessary to prevent him from committing a felony attempted by force or surprise, as murder, rape, sodomy, robbery, burglary, or arson.[423] The homicide in such a case is not merely excusable, but it is justifiable. "Such homicide," said Blackstone, "as is committed for the prevention of any forcible and atrocious crime, is justifiable by the laws of nature, and also by the law of England, as it stood as early as the time of Bracton;" and he specifies as of that character the offenses mentioned above.[424] It is

---

[422] 4 Bl. Comm. 179; 3 Inst. 52; I Hale, P. C. 501.

[423] 4 Bl. Comm. 180; Fost. C. L. 259; 273, Beale's Cas. 326; Steph. Dig. Crim. Law, art. 199; Cooper's Case, Cro. Car. 544, Beale's Cas. 347; Reg. v. Rose, 15 Cox, C. C. 540, Beale's Cas. 343; State v. Moore, 31 Conn. 479, 83 Am. Dec. 159; Pond v. People, 8 Mich. 150; Stoneman v. Com., 25 Grat. (Va.) 887; Ruloff v. People, 45 N. Y. 213.

[424] 4 Bl. Comm. 180.

not at all necessary that the felony shall be directed against the person, habitation, or property of the person committing the homicide, but it is justifiable to kill in order to prevent such a felony against a third person, even though he may be a stranger.

(*b*) *Statutory Felonies.*—This doctrine applies, it has been held, to felonies created by statute, if they are forcible felonies, although they may not have been crimes at all at common law. Thus, it has been applied to a homicide committed in order to prevent the statutory felony of breaking and entering a shop or warehouse with intent to steal, although this was no crime at all at common law.[425]

(*c*) *Necessity for the Homicide—Acting on Appearances.*—To bring a case within the doctrine, the homicide must be necessary to prevent the felony. It is only on the ground of necessity that it is justifiable.[426]

---

[425] State v. Moore, 31 Conn. 479, 83 Am. Dec. 159. See, also, Pond v. People, 8 Mich. 150.

[426] State v. Moore, 31 Conn. 479, 83 Am. Dec. 159; Storey v. State, 71 Ala. 330. And see People v. Cook, 39 Mich. 236, 33 Am. Rep. 380, Beale's Cas. 345; post, § 288.

It has been said that it need not be actually necessary, but it is enough if it is reasonably apparently so; that if a man kills another under a reasonable apprehension that the other intends to commit a felony, and that there is imminent danger of such design being carried into execution, he is justified in so doing, though the danger is unreal.[427] Strictly speaking, however, the homicide is not justifiable under such circumstances, but excusable on the ground of the mistake of fact.[428]

---

[427] Stoneman v. Com., 25 Grat. (Va.) 887.

In a New York case it was said: "One who is opposing and endeavoring to prevent the consummation of a felony by others may properly use all necessary force for that purpose, and resist all attempts to inflict bodily injury upon himself, and may lawfully detain the felons and hand them over to the officers of the law. Although the use of wanton violence and the infliction of unnecessary injury to the persons of the criminals is not premitted, yet the law will not be astute in searching for such line of demarcation in this respect as will take the innocent citizen, whose property and person are in danger, from its protection, and place him at the mercy of the felon." Ruloff v. People, 45 N. Y. 213.

[428] See Levett's Case, Cro. Car. 538, Beale's Cas. 279; post, § 274.

(*d*) *Secret Felonies.*—Since a homicide in prevention of a felony is only justifiable when necessary to prevent the felony, the doctrine does not apply to the prevention of felonies not attempted by violence or surprise. It does not apply to secret felonies, like larceny.[429]

(*e*) *Knowledge.*—And under no circumstances is a homicide justifiable because the deceased was committing a felony, if the accused had no knowledge of this fact at the time of the killing.[430]

---

[429] Reg. v. Murphy, 1 Craw. & D. 20, Beale's Cas. 318.

In Storey v. State, 71 Ala. 330, the evidence tended to show that the defendant killed the deceased in order to recapture a horse which the deceased had stolen from him. The larceny being a felony, the defendant requested the court to charge the jury that if the horse was feloniously taken and carried away by the deceased, and there was an apparent necessity to kill him in order to recover the property, and prevent the consummation of the felony, the homicide was justifiable. The request was refused, and the supreme court held that it was proper to refuse it, as a homicide to prevent a felony is justifiable only where the felony is attempted by force or surprise, as in the case of murder, robbery, rape, etc., and that the rule does not apply

269. Homicide to Prevent Misdemeanor or Trespass.

A homicide to prevent another from committing a mere misdemeanor, as, for example, a simple assault and battery, which does not endanger life or threaten great bodily harm, or an unlawful arrest, etc., is not justifiable.[431] Nor is a man justified in killing another to prevent a bare trespass upon land or goods.[432] As we have seen, however, a man, in such cases, may use reasonable force short of taking life or inflicting great bodily harm, without being guilty of assault and battery;[433] and, as we shall presently see, he will be excused if, in the conflict which ensues, he necessarily kills the other to save himself from death or great bodily harm.[434]

270. Homicide in Suppressing a Riot.

There is one exception to the rule that

---

to secret felonies, like larceny. See, also, State v. Moore, 31 Conn. 479, 83 Am. Dec. 159.

[430] See Reg. v. Dadson, 4 Cox, C. C. 358. Beale's Cas. 317.

[431] Ante, § 260 a-f; State v. Moore, 31 Conn. 479, 83 Am. Dec. 159.

[432] Ante, § 260 h; State v. Moore, supra.

[433] Ante, §§ 212-214.

[434] Post, § 277.

life cannot be taken to prevent a mere misdemeanor. Though a riot is only a misdemeanor at common law, it is generally so serious an offense that life may be taken, if necessary, in order to suppress it. "The intentional infliction of death or bodily harm," therefore, "is not a crime when it is done either by justices of the peace, peace officers, or private persons, whether such persons are, and whether they act as, soldiers under military discipline, or not, for the purpose of suppressing a general and dangerous riot which cannot otherwise be suppressed." [435]

271. Homicide in Effecting Arrest or Preventing Escape.

(*a*) *In Cases of Felony.*—Either an officer or a private person, having authority to arrest another for a felony, may kill him if he cannot otherwise be taken, and he may do so when the party is fleeing, as well as when he is engaged in violent resistance.[436]

---

[435] Steph. Dig. Crim. Law, art. 198; Pond v. People, 8 Mich. 150.

[436] Fost. C. L. 267, Beale's Cas. 311; Steph. Dig. Crim. Law, art. 199. And see Reneau v. State, 2 Lea (Tenn.) 720, 31 Am. Rep. 626.

A fortiori, when a felon has once been arrested, the officer or other person having him in custody may kill him, if necessary, in order to prevent his escape.[437] A person can not justify the killing of another on the ground that he had committed a felony, unless he knew of the fact at the time of the killing.[438]

(*b*) *In Cases of Misdemeanor.*—Some of the courts have applied the same rule to cases of misdemeanor, holding that life may be taken, if necessary, in effecting an arrest for a misdemeanor, or in order to prevent the escape of a person who is in custody for a

---

[437] U. S. v. Clark, 31 Fed. 710, Beale's Cas. 319; Reneau v. State, supra.

"The intentional infliction of death or bodily harm is not a crime when it is done by any person in order to arrest a traitor, felon, or pirate, or retake or keep in lawful custody a traitor, felon, or pirate who has escaped, or is about to escape, from such custody, although such traitor, felon, or pirate offers no violence to any person; provided the object for which death or harm is inflicted cannot be otherwise accomplished." Steph. Dig. Crim. Law, art. 199.

[438] Reg. v. Dadson, 4 Cox, C. C. 358, Beale's Cas. 317.

misdemeanor.[439] The better opinion, however, is to the contrary,[440] "the theory of the law being that it is better that a misdemeanant escape than that human life be taken."[441] If a lawful attempt to arrest a person for a misdemeanor is resisted, the officer may lawfully employ any necessary force short of taking life in order to effect the arrest, and if, in the course of the conflict, he is threatened with death or great bodily harm, and he necessarily kills the person whom he is attempting to arrest to save himself, the homicide is justifiable.[442]

(2) EXCUSABLE HOMICIDE IN GENERAL.

272. Definition.—Excusable homicide is homicide committed under circumstances that constitute, not a justification, but merely an excuse. It is of two sorts:

1. Homicide per infortunium, or by misadventure,—where a person unfortunately kills another in doing a lawful act, without any intent to hurt, and without criminal negligence.

---

[439] See State v. Garrett, 1 Winst. (N. C.) 144 84 Am. Dec. 359.

[440] Reneau v. State, 2 Lea (Tenn.) 720, 31 Am. Rep. 626; U. S. v. Clark, 31 Fed. 710, Beale's Cas. 319.

[441] Brown, J., in U. S. v. Clark, supra.

[442] Steph. Dig. Crim. Law, art. 200.

2. Homicide se defendendo, or in self-defense, upon a sudden affray,—where a person necessarily kills another, after becoming engaged in a sudden affray, in order to save himself from reasonably apparent danger of death or great bodily harm.[443]

273. Distinguished from Justifiable Homicide.

At common law there was certainly a clear distinction between excusable and justifiable homicide.[444] In justifiable homicide the slayer was regarded as doing what was right, and no fault whatever was imputed to him. This, of course, is still true. In excusable homicide, however, he was regarded as to some extent in fault. Thus, in the case of homicide in self-defense, on a sudden affray, he was regarded as at fault in being engaged in the affray.[445] And in the case of homicide by misadventure, the law "presumed negligence, or at least a want of sufficient caution in him who was so unfortunate as to

---

[443] 4 Bl. Comm. 182.

[444] See Erwin v. State, 29 Ohio St. 186, 23 Am. Rep. 733, where the distinction between justifiable and excusable self-defense is clearly explained. And see Fost. C. L. 262, Beale's Cas. 326.

[445] 4 Bl. Comm. 186, 187; Fost. C. L. 262, Beale's Cas. 326; Erwin v. State, supra; Pond v. People, 8 Mich. 150.

commit it, who therefore was not altogether faultless."[446] Sir Edward Coke said that anciently excusable homicide was punished by death;[447] but this is probably not true.[448] It was certainly punished, however, by forfeiture of goods and chattels.[449] Now it is no longer punished at all, either in England or in the United States.

274. Homicide by Misadventure.

(*a*) *Lawful Acts.*—Excusable homicide *per infortunium,* or by misadventure or accident, is where a person unfortunately kills another in the doing of a lawful act, without any intent to hurt, and without criminal negligence.[450] If a man kills another in doing a *lawful* act in a lawful manner,—that is, without negligence,—the homicide is excusable, "for the act is lawful, and the effect is merely accidental."[451] Such is the case where a

[446] 4 Bl. Comm. 186. See Pond v. People, 8 Mich. 150.

[447] 2 Inst. 148, 315.

[448] It was denied by later writers. See 1 Hale, P. C. 425, 4 Bl. Comm. 188.

[449] Fost. C. L. 287; 4 Bl. Comm. 188. See, also, Fost. C. L. 273, 274; 1 East, P. C. 279; 1 Hale, P. C. 482.

[450] 4 Bl. Comm. 182; Levett's Case, Cro. Car. 538, Beale's Cas. 279.

[451] 4 Bl. Comm. 182; Reg. v. Bruce, 2 Cox, C. C.

man is at work with a hatchet, and the head flies off and kills a bystander;[452] where a man is lawfully shooting at a mark, without negligence, and undesignedly kills a man;[453] where a parent is *moderately* correcting his child, a teacher his pupil, or a master his apprentice, and happens to cause his death;[454] where a person unintentionally kills another while engaged in a *lawful* game or sport, as boxing, wrestling, football, etc., provided he is playing it in a lawful manner;[455] or where a physician or other person unintentionally causes death by administering a dangerous drug or performing an operation, the circumstances not being such as to show culpable negligence.[456] It is not

262, Beale's Cas. 202; Reg. v. Bradshaw, 14 Cox, C. C. 83, Beale's Cas. 146. And see Belk v. People, 125 Ill. 584.

[452] 4 Bl. Comm. 182.

[453] 4 Bl. Comm. 182; 1 East, P. C. 260, 269.

[454] 4 Bl. Comm. 182; Fost. C. L. 262, Beale's Cas. 185, 315; 1 East, P. C. 260, 269.

[455] 4 Bl. Comm. 182; 1 Hale, P. C. 473; Reg. v. Young, 10 Cox, C. C. 371 (sparring); Reg. v. Bradshaw, 14 Cox, C. C. 83, Beale's Cas. 146 (football).

[456] 1 Hale, P. C. 429; 4 Bl. Comm. 197; Reg. v. Chamberlain, 10 Cox, C. C. 486, Beale's Cas. 187;

unlawful to attempt to procure an abortion when in proper professional judgment it is necessary to save the life of the mother, and, if the mother is unintentionally killed in such an attempt, the homicide is excusable.[457] One who, in lawful self-defense against another, unintentionally, and without negligence, kills a third person, is excusable.[458]

(*b*) *Unlawful Acts.*—To render a homicide excusable on the ground of misadventure or accident the accused must have been engaged in a lawful act, or at least in an act that was a mere civil trespass, or that was merely *malum prohibitum,* and not *malum in se.*[459] If a person unintentionally kills another in doing a criminal act that is *malum*

Rex v. Williamson, 3 Car. & P. 635; Rex v. Van Butchell, 3 Car. & P. 629; Rex v. Long, 4 Car. & P. 398; Reg. v. Macleod, 12 Cox, C. C. 534; Com. v. Thompson, 6 Mass. 134; Rice v. State, 8 Mo. 561; ante, § 264 d.

[457] State v. Moore, 25 Iowa, 128, 95 Am. Dec. 776.

[458] Plummer v. State, 4 Tex. App. 310, 30 Am. Rep. 165.

[459] 4 Bl. Comm. 182; Levett's Case, Cro. Car. 538, Beale's Cas. 279; Reg. v. Franklin, 15 Cox, C. C. 163, Beale's Cas. 203; Com. v. Adams, 114 Mass. 323, 19 Am. Rep. 362, Beale's Cas. 204.

in se, he is certainly guilty of manslaughter,[460] and in some cases of murder.[461] Thus, it is not excusable homicide, but manslaughter, at least, to kill another, though unintentionally, in assaulting and beating him,[462] or in a prize fight, if prize fighting is unlawful,[463] or in any unlawful game or sport.[464] Immoderate correction of a child by a parent, teacher, or master is unlawful, and an assault and battery, and if death is caused thereby, it is manslaughter at least, and it may be murder.[465]

To unintentionally kill another in committing a mere civil trespass, not naturally endangering life, is excusable.[466] And, as

---

[460] Ante. § 263.

[461] Ante, §§ 244, 248, 249.

[462] Wild's Case, 2 Lewin, C. C. 214, Beale's Cas. 347; Fray's Case, 1 East, P. C. 236, Beale's Cas. 477; ante, § 263 b.

[463] Ward's Case, 1 East, P. C. 270; ante, § 263b.

[464] 4 Bl. Comm. 183; 1 Hale, P. C. 472; 1 Hawk. P. C. 74; ante, § 263 b.

[465] 4 Bl. Comm. 182, 183; 1 Hale, P. C. 473, 474; Reg. v. Hopley, 2 Fost. & F. 202; Grey's Case, Kelyng, 64, Beale's Cas. 463; Reg. v. Griffin, 11 Cox, C. C. 402; ante, §§ 244, 263 c.

[466] Reg. v. Franklin, 15 Cox, C. C. 163, Beale's Cas. 203; ante, § 263 h.

we have seen, it is excusable homicide, and not manslaughter, to unintentionally kill another in committing a misdemeanor, if the act is merely *malum prohibitum,* and not naturally dangerous to life.[467]

(*c*) *Negligence.*—If a man is guilty of criminal negligence in doing an act, even though the act may be lawful but for such negligence, and unintentionally kills another, the homicide is not excusable, but is at least manslaughter.[468] For example, while it is lawful to shoot at a mark, and, if there is no negligence, homicide unintentionally committed in doing so is excusable, yet it is manslaughter if the homicide is caused by negligently shooting in the direction of a habitation.[469] The same is true of careless driving, careless running of steamboats or railroad trains, careless use or custody of poison, explosives, and other dangerous agencies, careless performance of a surgical operation, and the like.[470]

---

[467] Com. v. Adams, 114 Mass. 323, 19 Am. Rep. 362, Beale's Cas. 204; ante, § 263 g.

[468] Ante, § 264.

[469] Ante, § 264 c.

[470] Rex v. Walker, 1 Car. & P. 320; Reg. v. Swin-

275. Killing Wife's Paramour.

The killing by a husband of his wife's paramour is not justifiable or excusable at common law,[471] though in some states it is made so by statute.[472] If the husband sees them in the act, he is guilty of manslaughter at common law, as already shown; and, by the weight of authority, if he does not see them in the act, he is guilty of murder.[473]

(3) SELF-DEFENSE.

276. In General.—Homicide in self-defense is either justifiable or excusable. At common law—

1. Justifiable self-defense is where a person is feloniously assaulted, being without fault himself, and necessarily kills his assailant to save himself from death or great bodily harm, or from some other felony attempted by force or surprise.

---

dall, 2 Car. & K. 230, 2 Cox, C. C. 141, Beale's Cas. 167; Reg. v. Trainer, 4 Fost. & F. 105; Reg. v. Chamberlain, 10 Cox, C. C. 486, Beale's Cas. 187; Rex v. Senior, 1 Mood. C. C. 346, 1 Lewin, C. C. 183; ante, §§ 264 b-d.

[471] Pearson's Case, 2 Lewin, C. C. 216; Hooks v. State, 99 Ala. 166.

[472] See Price v. State, 18 Tex. App. 474, 51 Am. Rep. 322; Biggs v. State, 29 Ga. 723, 76 Am. Dec. 630.

[473] Ante, § 260 e.

2. **Excusable self-defense is where a person becomes engaged in a sudden affray or combat, and in the course of the affray or combat necessarily, or under reasonably apparent necessity, kills his adversary to save himself from death or great bodily harm.**

Conditions of Self-Defense.—To render a homicide justifiable or excusable on the ground of self-defense—

1. **It must reasonably appear that there is imminent danger of death, or of some other felony, or of great bodily harm.**
2. **The danger need not necessarily be real, but there must be reasonable grounds for supposing it to be real.**
3. **In the case of excusable self-defense, in a sudden affray, the party threatened must retreat as far as he can with safety before taking his adversary's life. Some courts apply the same rule to justifiable self-defense, where a person is feloniously assaulted, being without fault himself, but the better opinion is that retreat is not necessary in such a case.**
4. **The slayer must not have been the aggressor, or otherwise provoked the difficulty.**

277. Justifiable Self-Defense.

As was stated in a previous section, homicide in self-defense may be justifiable, or it may be merely excusable. This is certainly

so at common law, though in some states the statutes have done away with the distinction, and have classed all homicide in self-defense as justifiable.[474]

It is clear, under the authorities at common law, that if a man feloniously assaults another, with intent to kill him or to inflict great bodily harm, the person threatened, being without fault himself, may stand his ground and kill his assailant, if it is necessary to do so in order to save himself from death or great bodily harm, and the homicide will be justifiable, as distinguished from excusable, self-defense.[475] In like manner a woman may kill a man to prevent him from committing a rape upon her.[476] And, if necessary, a person may kill another to prevent an attempted robbery.[477] In these cases the homicide is clearly justifiable, because committed in order to prevent a felony.[478]

---

[474] See Shorter v. People, 2 N. Y. 193, 51 Am. Dec. 286, Beale's Cas. 330.

[475] 1 Hale, P. C. 40; 4 Bl. Comm. 183, 184; 1 East, P. C. 271; Fost. C. L. 273, Beale's Cas. 326; Erwin v. State, 29 Ohio St. 186, 23 Am. Rep. 733; Pond v. People, 8 Mich. 150.

[476] Ante, § 268 a.

[477] Ante, § 268 a.

[478] Ante, §§ 268 a-e

278. Excusable Self-Defense.

Excusable homicide in self-defense differs from justifiable homicide in self-defense in that the parties are engaged in an affray or mutual combat, by reason of which both are deemed to be in fault, so that the homicide is merely excused, and not justified. It is called homicide *se defendendo*, on a sudden affray. The affray may arise in various ways. Where a person is assaulted without felonious intent, and engages in a combat with his assailant, in the course of which it becomes necessary to kill his adversary in order to save himself from death or great bodily harm, and he does so, after retreating as far as he can with safety, he is regarded, according to the common law, as being to some extent in fault, and the homicide is not justifiable, but it is excusable.[479] Formerly it was punished by forfeiture of goods, and certain

[479] 4 Bl. Comm. 186, 187; 1 Hawk. P. C. c. 28, § 24; Erwin v. State, 29 Ohio St. 186, 23 Am. Rep. 733; State v. Ingold, 4 Jones (N. C.) 216, 67 Am. Dec. 283; Noles v. State, 26 Ala. 31, 62 Am. Dec. 711; Pond v. People, 8 Mich. 150.

Foster calls this self-defense culpable, but, through the benignity of the law, excusable. Fost. C. L. 273, 274.

other consequences followed on the idea of guilt.[480] Now, however, it is not punishable at all. Except as respects the duty to retreat, the slayer is in the same position as in the case of justifiable self-defense. As was stated above, the affray may arise in various ways. It may arise from resenting and returning a blow, or from resenting insulting words, or from resisting a trespass on land or goods, or from resisting an unlawful arrest. None of these provocations justify or excuse a homicide, and some of them do not even reduce it to manslaughter. If, however, in any of these cases it becomes necessary for one of the parties to take the other's life to save himself from death or great bodily harm, and if he does so, the homicide is excusable, except as explained in the sections following.[481]

279. Imminence of the Danger.

A homicide is not justifiable or excusable on the ground of self-defense unless it is apparently necessary to save the life of the slay-

---

[480] Ante, § 273.

[481] 4 Bl. Comm. 186, 187. See White v. Territory, 3 Wash. T. 397; Noles v. State, 26 Ala. 31, 62 Am. Dec. 711; Pond v. People, 8 Mich. 150.

er, or prevent some other felony, like rape or robbery, or to save him from great bodily harm. The apprehension of no other danger will either justify or excuse the resorting to so extreme a measure as the taking of life.[482] It is also necessary that the danger shall be apparently *imminent* at the time of the homicide, and not merely prospective. A man's bare fear, however well grounded, that another intends to kill him or do him great bodily harm, will not justify or excuse his killing the other, unless there is some overt act indicating a purpose to immediately

[482] Napier's Case, Fost. C. L. 278; Creighton v. Com., 84 Ky. 103, 4 Am. St. Rep. 193, Beale's Cas. 339; Greschia v. People, 53 Ill. 295; Pierson v. State, 12 Ala. 149; Jackson v. State, 77 Ala. 18; Dolan v. State, 81 Ala. 11; Noles v. State, 26 Ala. 31, 62 Am. Dec. 711; State v. Shippey, 10 Minn. 223, 88 Am. Dec. 70; State v. Wells, 1 N. J. Law, 424, 1 Am. Dec. 211; Com. v. Drum, 58 Pa. St. 9; Jones v. State, 76 Ala. 8; Logue v. Com., 38 Pa. St. 265, 80 Am. Dec. 481; Meurer v. State, 129 Ind. 587; and cases cited in the notes following.

The killing need not have been necessary to save the life of the accused. It is sufficient if it was necessary in order to save him from great bodily harm. State v. Benham, 23 Iowa, 154, 92 Am. Dec. 417.

carry out such intention.[483] Thus, the fact that a dangerous man has threatened to kill another on sight, and that the other has heard of the threat, or mere verbal threats at the time, will not justify him in taking his enemy's life, unless there is some overt act indicating a purpose to immediately put the threat into execution.[484] The fact that he knows that his enemy is armed is not enough,

---

[483] U. S. v. Outerbridge, 5 Sawy. 620, Fed. Cas. No. 15,978; State v. Scott, 4 Ired. (N. C.) 409, 42 Am. Dec. 148; Harrison v. State, 24 Ala. 67, 60 Am. Dec. 450; State v. Cain, 20 W. Va. 679; State v. Evans, 33 W. Va. 417; State v. Abbott, 8 W. Va. 741; State v. Shippey, 10 Minn. 223, 88 Am. Dec. 70; Pierson v. State, 12 Ala. 149; Dolan v. State, 81 Ala. 11; Jackson v. State, 77 Ala. 18; Stoneman v. Com., 25 Grat. (Va.) 887; Field v. Com., 89 Va. 690; State v. Benham, 23 Iowa, 154, 92 Am. Dec. 417; State v. Sullivan, 51 Iowa, 142; Greschia v. People, 53 Ill. 295; Logue v. Com., 38 Pa. St. 265, 80 Am. Dec. 481.

"The danger must be imminent, impending, present, not prospective, not even in the near future." Dolan v. State, 81 Ala. 11.

[484] State v. Cain, 20 W. Va. 679; State v. Evans, 33 W. Va. 417; State v. Scott, 4 Ired. (N. C.) 409, 42 Am. Dec. 148; Mize v. State, 36 Ark. 653; Parsons v. Com., 78 Ky. 102; Wall v. State, 18 Tex. 682, 70 Am. Dec. 302; State v. Sullivan, 51 Iowa, 142.

if the latter shows no present intention to use his weapon.[485] Certainly, a homicide can never be justifiable or excusable on the ground of self-defense, if, at the time of the killing, the deceased had thrown away his weapon and was turning away.[486]

It is the province of the court to instruct the jury what the law is in relation to the right of self-defense. Whether, under the law as thus laid down, a necessity existed at the time to take life in order to save life or prevent grievous bodily harm, and whether the killing, under the circumstances of the particular case, was prompted by such necessity, or by some other motive, is to be determined by the jury.[486a]

Assault not Threatening Death or Great Bodily Harm.—If a person is assaulted, but not in such a way as to endanger his life or threaten great bodily harm, he may oppose force to force, and if, in the conflict which

---

[485] Harrison v. State, 24 Ala. 67, 60 Am. Dec. 450; Roberts v. State, 65 Ga. 430; Goodall v. State, 1 Or. 333, 80 Am. Dec. 396, State v. Brittain, 89 N. C. 481.

[486] Meurer v. State, 129 Ind. 587.

[486a] Erwin v. State, 29 Ohio St. 186.

ensues, his adversary threatens to kill him or to inflict great bodily harm, he may, after retreating as far as safety will permit, kill him to avoid the threatened injury, and in such a case the homicide will be excusable on the ground of self-defense.[487] But a simple assault not apparently endangering life nor threatening great bodily harm will not justify or excuse his killing his assailant or using a deadly weapon. Under such circumstances the homicide will be manslaughter, at least.[488]

---

[487] Ante, § 277.

[488] Reg. v. Hewlett, 1 Fost. & F. 91, Beale's Cas. 329; Creighton v. Com., 84 Ky. 103, 4 Am. St. Rep. 193, Beale's Cas. 339; State v. Thompson, 9 Iowa, 188, 74 Am. Dec. 342; Com. v. Drum, 58 Pa. St. 9; Grainger v. State, 5 Yerg. (Tenn.) 459; Davis v. People, 88 Ill. 350; State v. Cain, 20 W. Va. 679; State v. Evans, 33 W. Va. 417; Myers v. State, 62 Ala. 599; State v. Rogers, 18 Kan. 78, 26 Am. Rep. 754; Honesty v. Com., 81 Va. 283; Shorter v. People, 2 N. Y. 193, 51 Am. Dec. 286; and other cases cited in note 479, supra.

In Napier's Case, Fost. C. L. 278, the defendant was indicted for the murder of his brother, and the circumstances as they appeared in evidence were as follows: The defendant on the night of the homicide came home drunk. His father ordered him to go to bed, which he refused to do,

Unlawful Arrest.—The same principle applies to the resistance of an unlawful arrest. When an unlawful attempt is made to arrest a man, he may oppose force to force, and, if it becomes necessary in the conflict to kill his assailant to save himself from death or great bodily harm, the homicide will be excusable.[489] But unless this necessity apparently exists, a man cannot kill another or use a deadly weapon merely to prevent an unlawful arrest. If he does so, he is guilty of manslaughter, at least.[490]

---

and thereupon a scuffle ensued between them. The deceased, who was in bed, hearing the disturbance, got up and fell upon the defendant, threw him down and beat him upon the ground, and held him down, so that he could not escape, nor avoid the blows. While they were thus striving together, the defendant gave the deceased a wound with a penknife and killed him. On a special verdict stating these circumstances, and upon a conference of all the judges of England, it was unanimously held that the homicide was not excusable, but was manslaughter, "for there did not appear to be any inevitable necessity, so as to excuse the killing in this manner."

[489] Ante, § 277. See Noles v. State, 26 Ala. 31, 62 Am. Dec. 711.

[490] Creighton v. Com., 84 Ky. 103, 4 Am. St. Rep. 193, Beale's Cas. 339; Noles v. State, 26 Ala.

280. Acting on Appearances.

Though there are some cases to the contrary,[491] it must now be regarded as settled that it is not necessary that there shall be an actual danger to entitle a person to defend himself. A reasonable appearance of danger is enough, for a man must be permitted to act on appearances, without regard to the unexpressed intention of the person threatening him. So long as he acts reasonably, and in the *bona fide* belief that he will suffer death or great bodily harm unless he takes his assailant's life, he will be excused to the same extent as if the danger were real.[492] Thus, if

---

31, 62 Am. Dec. 711. But see State v. Oliver, 2 Houst. (Del.) 604.

Homicide to prevent an arrest is justifiable, even though there may have been a right to make the arrest, if it is attempted in such a wanton and menacing manner as to threaten the party with loss of life or great bodily harm. Jones v. State, 26 Tex. App. 1, 8 Am. St. Rep. 454.

[491] See Reg. v. Smith, 8 Car. & P. 160; Reg. v. Bull, 9 Car. & P. 22; State v. Vines, 1 Houst. C. C. (Del.) 424; State v. Hollis, Houst. C. C. (Del.) 24. And see State v. Benham, 23 Iowa, 154, 92 Am. Dec. 417.

[492] Selfridge's Case (Mass.) 160, referred to in Beale's Cas. 331; Shorter v. People, 2 N. Y. 193,

a man who has threatened to kill another on sight presents a pistol on meeting him, the latter may reasonably suppose he intends to carry out his threat, and, if he kills him in such belief, the homicide is not criminal, though the pistol may not be loaded, and the intention may be merely to frighten. So, if a person who has threatened to kill another should, on

---

51 Am. Dec. 286, Beale's Cas. 330; Logue v. Com., 38 Pa. St. 265, 80 Am. Dec. 481; Campbell v. People, 16 Ill. 17, 61 Am. Dec. 49; Schnier v. People, 23 Ill. 17; Steinmeyer v. People, 95 Ill. 383; Patten v. People, 18 Mich. 314, 100 Am. Dec. 173; Pond v. People, 8 Mich. 150; Stoneman v. Com., 25 Grat. (Va.) 887; Brown v. Com., 86 Va. 466; State v. Eaton, 75 Mo. 586; State v. Cain, 20 W. Va. 679; State v. Evans, 33 W. Va. 417; People v. Anderson, 44 Cal. 65; People v. Morine, 61 Cal. 367; Murray v. Com., 79 Pa. St. 311; Brumley v. State, 21 Tex. App. 223; Jordan v. State, 11 Tex. App. 435; Patillo v. State, 22 Tex. App. 586; Goodall v. State, 1 Or. 333, 80 Am. Dec. 396; Marts v. State, 26 Ohio St. 162.

For this reason, an instruction that, "to justify a person in killing another in self-defense, it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily harm, the killing of the deceased was absolutely necessary," was held to be erroneous. People v. Morine, 61 Cal. 367.

meeting him, make a movement as if to draw a weapon, the other would not be punishable for killing him, though it might afterwards appear that the deceased was not armed.[493] These cases, however, where there was in fact no intention on the part of the deceased to kill, are all more properly cases of excusable homicide,—excusable on the ground of the mistake of fact.[494]

Reasonable Grounds for Apprehension of Danger.—In a Tennessee case it was held that one who kills another, believing himself in danger of death or great bodily harm, will be justified, although he may act from cowardice, and without any sufficient grounds for his belief that there is danger.[495] This decision, however, cannot be sustained. While a man may act upon appearances, he must act reasonably. "It is not enough that he believed himself in danger, unless the

---

[493] Patillo v. State, 22 Tex. App. 586, and other cases above cited.

[494] Ante, §§ 68 et seq., 274.

As to homicide by a somnambulist, see Fain v. Com., 78 Ky. 183, 39 Am. Rep. 213.

[495] Grainger v. State, 5 Yerg. (Tenn.) 459, 26 Am. Dec. 278. And see Morgan v. State, 3 Sneed (Tenn.) 480.

facts and circumstances are such that the jury can say that he had reasonable grounds for his belief."[496] As was said in a Georgia

[496] Shorter v. People, 2 N. Y. 193, 51 Am. Dec. 286, Beale's Cas. 330. And see Creek v. State, 24 Ind. 151; Wesley v. State, 37 Miss. 327, 75 Am. Dec. 62; Parker v. State, 55 Miss. 414; Kendrick v. State, 55 Miss. 436; Darling v. Williams, 35 Ohio St. 58; State v. Shippey, 10 Minn. 223, 88 Am. Dec. 70; Greschia v. People, 53 Ill. 295; State v. Parker, 106 Mo. 218; Golden v. State, 25 Ga. 527; State v. Thompson, 9 Iowa, 188, 74 Am. Dec. 342; State v. Abbott, 8 W. Va. 741; State v. Cain, 20 W. Va. 679; State v. Evans, 33 W. Va. 417; Stoneman v. Com., 25 Grat. (Va.) 887; Field v. Com., 89 Va. 690; Jones v. State, 76 Ala. 8; People v. Williams, 32 Cal. 281; Goodall v. State, 1 Or. 333, 80 Am. Dec. 396.

In Wesley v. State, supra, it was said: "The mere fear, apprehension, or belief, however sincerely entertained by one man, that another designs to take his life, will not excuse or justify the killing of the latter by the former. Where the danger is neither real nor urgent, to render a homicide excusable or justifiable, within the meaning of the law, there must, at the least, be some attempt to execute the apprehended design; or there must be reasonable ground for the apprehension that such design will be executed, and the danger of its accomplishment imminent. A party may have a lively apprehension that his life is in danger, and believe that the grounds of

case, the law makes no discrimination in favor of a drunkard or a coward, or any particular individual; but the circumstances must be such as to justify the fears of a reasonable man.[497] Former hostile acts or threats, or present verbal threats, are not sufficient ground for apprehending danger, where there is no overt act indicating a present intention to execute the threats.[498]

Considerations in Determining Reasonableness.—Whether or not there were reasonable grounds for the belief of the accused that his life was in imminent danger, and could only be saved by such means as he employed, is to be determined in view of all the circumstances of each particular case, and

his apprehension are just and reasonable; but if he act upon them, and take the life of a human being, he does so at his peril. He is not the final judge, whatever his apprehension or belief may have been of the reasonableness of the ground upon which he acted. That is a question which the jury alone are to determine."

[497] Golden v. State, 25 Ga. 527.

[498] State v. Cain, 20 W. Va. 679; Gladden v. State, 12 Fla. 562; Cahill v. People, 106 Ill. 621; People v. McLeod, 1 Hill (N. Y.) 377, 37 Am. Dec. 328; Parsons v. Com., 78 Ky. 102; Lewis v. State, 51 Ala. 1; ante, notes 480-482.

the jury should take into consideration the excitement and confusion, if any, which would naturally result under such circumstances. On a prosecution for the killing of one of a body of rioters who came to the house of the accused in the night time, it was said by the Michigan court: "In estimating the nature and imminence of the danger, in the choice of means to avoid it, or the amount of force or kind of weapon to be used in repelling it, the excitement and confusion which would naturally result from the surrounding circumstances, for which the rioters alone were responsible, should not be overlooked. To require of the defendant, while under a high degree of mental excitement, induced by their wrongful and criminal conduct, and without his fault, the same circumspection, and cool, deliberate judgment, in estimating the danger, or the choice of means for repelling it, as we, who are unaffected by the excitement or the danger, may now exercise in contemplating it, would be to ignore the laws of our being, and to require a degree of perfection to which human nature has not yet attained. Of the weight a jury should give to these considerations, no

safer standard can be found than their own individual consciousness, and the consideration of what they, with the honest purpose of avoiding the danger, without unnecesarily taking life, might, under the circumstances in which the defendant was placed, be likely to do."[499]

281. Duty to Retreat—Excusable Self-Defense.

It is well settled that a homicide in a sudden affray is not excusable on the ground of self-defense, unless the accused retreats as far as he safely can in order to avoid the violence of the deceased and the necessity to take his life. If he fails to do this, the homicide is manslaughter, at least. "The party assaulted," says Blackstone, "must flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault will permit him."[500] He need only retreat, how-

---

[499] Patten v. People, 18 Mich. 314, 100 Am. Dec. 173. See, also, Pond v. People, 8 Mich. 150; Logue v. Com., 38 Pa. St. 265, 80 Am. Dec. 481; Greschia v. People, 53 Ill. 295; Bell v. State, 20 Tex. App. 445; Patillo v. State, 22 Tex. App. 586.

[500] 4 Bl. Comm. 185; 1 Hale, P. C. 483; Fost. C. L. 273, Beale's Cas. 326, 328; Finch v. State, 81 Ala. 41; Pond v. People, 8 Mich. 150; State v.

ever, when he can do so with safety. If the assault upon him is so fierce as not to allow him to yield a step without manifest danger of death or great bodily harm, he may kill his assailant instantly, and the homicide will be excusable.[501] These are the rules governing excusable self-defense, as distinguished from justifiable self-defense.

Justifiable Self-Defense.—It is clear, under the authorities at common law, that the rule requiring retreat, if possible, does not apply in the case of justifiable self-defense.[502] If a man feloniously assaults another with intent to kill him or to inflict

---

Cain, 20 W. Va. 679; State v. Evans, 33 W. Va. 417; Dock v. Com., 21 Grat. (Va.) 909; Brown v. Com., 86 Va. 466; Shorter v. People, 2 N. Y. 193, 51 Am. Dec. 286; Dolan v. State, 40 Ark. 454; Mitchell v. State, 22 Ga. 211, 68 Am. Dec. 493; Gilleland v. State, 44 Tex. 356. And see Com. v. Drum, 58 Pa. St. 9.

[501] 4 Bl. Comm. 185; 1 Hawk. P. C. c. 29, § 14; Creek v. State, 24 Ind. 151; Dock v. Com., 21 Grat. (Va.) 909; Brown v. Com., 86 Va. 466; State v. Hill, 4 Dev. & B. (N. C.) 491, 34 Am. Dec. 396; Com. v. Drum, 58 Pa. St. 9; State v. Tweedy, 5 Iowa, 433.

[502] As to the distinction between justifiable and excusable self-defense, see ante, §§ 273, 277, 278.

great bodily harm, and the person assaulted is himself without fault, he is not bound to retreat at all, even though he might do so with safety, but he may stand his ground, and kill his assailant, if it be apparently necessary in order to save himself; and the homicide in such case will be justifiable. This distinction between justifiable and excusable self-defense, with respect to the duty to retreat, is clearly recognized by Hale, Foster, East, and other early authorities on the criminal law, and has been recognized and applied in some of the late cases.[503] In a well-considered Ohio case it appeared that the defendant was standing in a shed, where he had a right to be, and that the deceased, after angry words had passed between them, approached in a threatening manner with an axe. The defendant warned him not to enter, but he continued to advance, and when he reached the eave of the shed, perhaps within striking distance of the defendant, the lat-

[503] 1 Hale, P. C. 40; 1 East, P. C. 271; Fost. C. L. 273, Beale's Cas. 326; Erwin v. State, 29 Ohio St. 186, 23 Am. Rep. 733; Runyan v. State, 57 Ind. 80, 26 Am. Rep. 52. And see Pond v. People, 8 Mich. 150.

ter shot and killed him. Upon this evidence the court instructed the jury to acquit the defendant if he acted in necessary self-defense, "provided he used all means in his power otherwise to save his own life, or to prevent the intended harm, as retreating as far as he could," etc. The defendant was convicted, but on writ of error the judgment was reversed because the charge required him to retreat, even though the deceased had feloniously assaulted him without fault on his part. The court reviewed the authorities, and properly drew the distinction between justifiable self-defense and excusable self-defense. "A true man," it was said, "who is without fault, is not obliged to fly from an assailant who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm."[504]

Cases Ignoring This Distinction.—Some of the courts have refused to recognize this distinction, clearly as it is established by authority at common law, and have held that the person assaulted must retreat in all cases, if he can safely do so, though the attack upon

[504] Erwin v. State, 29 Ohio St. 186, 23 Am. Rep. 733.

him may be felonious, and though he may himself be free from fault.[505]

Retreat in One's House.—The rule that a person who is assaulted without felonious intent, or in some states in all cases, is bound to retreat, if he can do so with safety, before taking the life of his assailant to save himself from death or great bodily harm, does not apply where a man is assaulted in his own house. In such a case he is not bound to retreat, even though by doing so he might manifestly secure his safety, but he may stand his ground, and take his assailant's life if it becomes necessary.[506]

---

[505] State v. Donnelly, 69 Iowa, 705, 58 Am. Rep. 234, Beale's Cas. 338; State v. Rheams, 34 Minn. 18; Com. v. Drum, 58 Pa. St. 9; People v. Sullivan, 7 N. Y. 396.

[506] 1 Hale, P. C. 486; State v. Middleham, 62 Iowa, 150; State v. Donnelly, 69 Iowa, 705, 58 Am. Rep. 234, Beale's Cas. 338; Pond v. People, 8 Mich. 150; State v. Patterson, 45 Vt. 308, 12 Am. Rep. 200, Beale's Cas. 348; Jones v. State, 76 Ala. 8; State v. Harman, 78 N. C. 515.

A man's place of business is deemed his dwelling, for the purposes of this doctrine. Jones v. State, 76 Ala. 8.

The principle applies as between partners, joint tenants, and tenants in common. Id.

282. Effect of the Accused being the Aggressor—Justifiable Self-Defense.

In order that a homicide may be *justifiable* on the ground of self-defense, it is clear that the accused must not have caused the necessity to kill by his own fault. If he was himself in fault in bringing on the difficulty, as where he made the first assault or otherwise provoked the difficulty, whether with or without a felonious intent, the homicide may under some circumstances be excusable,[507] but, strictly and accurately speaking, it cannot be said to be justifiable.

Excusable Self-Defense.—There are some decisions to the effect that one who is himself the aggressor, or who otherwise brings on or provokes a difficulty, whether by acts or words, will not be excused for afterwards killing his adversary in self-defense, even though he may not have been actuated by malice in bringing on the difficulty.[508] The

---

[507] See the cases cited in the notes following.

[508] State v. Parker, 106 Mo. 218. See, also, Jackson v. State, 81 Ala. 33; Baker v. State, 81 Ala. 38; Judge v. State, 58 Ala. 406, 29 Am. Rep. 757; Logue v. Com. 38 Pa. St. 265, 80 Am. Dec. 481; State v. Neely, 20 Iowa, 108; State v. Benham, 23 Iowa, 154, 92 Am. Dec. 417.

better opinion, however, is against this view, and in favor of the doctrine that one who commits an assault without malice, or otherwise provokes a difficulty without malice, and thereby brings on a conflict, may withdraw from the conflict, and if he does so in good faith, and in such an unequivocal manner as to show his adversary that he desires to withdraw, and his adversary follows him, and attempts to kill him or do him great bodily harm, he has the same right of self-defense as if he had not originally been the aggressor.[509] If, however, he does not withdraw, or offer to withdraw, he cannot successfully plead self-defense, but will be guilty of manslaughter at least.[510]

---

[509] 1 Hale, P. C. 428; Fost. C. L. 273, Beale's Cas. 326, 328; 4 Bl. Comm. 185, 186; Stoffer v. State, 15 Ohio St. 47, 86 Am. Dec. 470, Beale's Cas. 334; Evans v. State, 44 Miss. 762; Vaiden v. Com., 12 Grat. (Va.) 717.

[510] Adams v. People, 47 Ill. 376; Greschia v. People, 53 Ill. 295; State v. Linney, 52 Mo. 40; Logue v. Com., 38 Pa. St. 265, 80 Am. Dec. 481. Stoffer v. State, 15 Ohio St. 47, 86 Am. Dec. 470, Beale's Cas. 334. Compare People v. Batchelder, 27 Cal. 69, 85 Am. Dec. 231.

If a person resists a lawful attempt to arrest him, and kills the officer in the conflict which en-

283. Original Assault with Malice.

It has been held by some courts that even when a man assaults another with malice, and afterwards kills him, he may successfully plead self-defense on the ground that the homicide was necessary to save his own life, if he repented before the killing and withdrew from the difficulty in such a way as to clearly show an abandonment of his original purpose, and his adversary, instead of allowing him to withdraw, persisted in following him, and attempting to kill him.[511] This seems to be the proper view, but it is doubtful whether it is supported by authority.[512]

---

sues, he is so much in the wrong that he cannot set up the plea of self-defense, even though the killing may have been necessary to save his life. State v. Garrett, 1 Winst. (N. C.) 144, 84 Am. Dec. 359.

It has also been held that one caught in the act of adultery with another's wife, and attacked by the husband, cannot kill him in self-defense. Drysdale v. State, 83 Ga. 744, 20 Am. St. Rep. 340; Reid v. State, 11 Tex. App. 509, 40 Am. Rep. 795.

Compare Wilkerson v. State, 17 S. E. 990; Franklin v. State, 30 Tex. App. 628; Varnell v. State, 20 Tex. App. 56.

[511] Stoffer v. State, 15 Ohio, 47, 86 Am. Dec. 470, Beale's Cas. 334. And see 1 Hale, P. C. 479, 480.

[512] See the cases cited in note 513, infra.

There is certainly no right of self-defense, if the withdrawal is not in good faith, but in such a case the homicide is murder. "If A. hath malice against B., and meeteth him and striketh him, and then B. draweth at A., and A. flyeth back until he come to a wall, and then kills B., this is murder, notwithstanding his flying to the wall; for the craft of flying shall not excuse the malice which he had, nor shall any such device to wreak his malice on another, and think to be excused by law, avail him anything, but in such case the malice is enquirable, and, if that be found by the jury, then his flight is so far from excusing the crime that it aggravates it."[513]

There is no right of self-defense if the conduct of the party is not so marked in the matter of time, place, and circumstance as to clearly show his adversary that his danger has passed, and to make his conduct thereafter the pursuit of vengeance, rather than defense against the original assault.[514] Nor

---

[513] Anon, J. Kelyng, 58, Beale's Cas. 329. And see 1 Hale, P. C. 479, 480, 482; Stoffer v. State, 15 Ohio St. 47, 86 Am. Dec. 470, Beale's Cas. 334; Greschia v. People, 53 Ill. 295.

[514] Stoffer v. State, supra.

is there any right of self-defense if he does not withdraw, or offer to withdraw; and it can make no difference that he cannot withdraw with safety.[515]

Indeed, the weight of authority is in favor of the view that there is no right of self-defense at all in one who has assaulted another with malice. Thus, it is said that if two persons agree to fight a duel, and one of them kills the other, it is murder, though the deceased may have fired the first shot, or given the first blow, and the accused may have retreated as far as he could before killing him. It is murder, says Blackstone, "because of the previous malice and concerted design."[516]

284. Actual Malice at Time of Killing.

It has been held that if the circumstances are such as to justify a man in taking the life of another to save his own, under the rules above stated, and he does so, the fact that he

---

[515] State v. Hill, 4 Dev. & B. (N. C.) 491, 34 Am. Dec. 396.

[516] 4 Bl. Comm. 185. And see 1 Hawk. P. C. c. 11, § 18; Id., c. 13, § 26; State v. Hill, 4 Dev. & B. (N. C.) 491, 34 Am. Dec. 396; Angell v. State, 36 Tex. 542, 14 Am. Rep. 380; Clifford v. State, 58 Wis. 477. And see Greshia v. People, 53 Ill. 295.

has actual malice against the other will not render him guilty of a felonious homicide.[517]

285. Killing Innocent Person to Save One's Own Life.

It has been said that if two persons are in such a situation that the death of one is necessary to save the other, the killing of one by the other to save his own life is excusable, though both are equally innocent,—as in the case mentioned by Lord Bacon, where two shipwrecked men are on a plank which is not able to save them both, and one pushes the other off.[518] This, however, as we have seen, is at least doubtful.[519]

(4) DEFENSE OF PROPERTY.

286. In General.—Life cannot be taken in defense of one's property, real or personal, unless it is

---

[517] Golden v. State, 25 Ga. 527. It was said in this case: "One may harbor the most intense hatred toward another; he may court an opportunity to take his life; may rejoice while he is imbruing his hands in his heart's blood; and yet, if, to save his own life, the facts showed that he was fully justified in slaying his adversary, his malice shall not be taken into account. This principle is too plain to need amplification."

[518] 4 Bl. Comm. 186; ante, § 82.

[519] Reg. v. Dudley, 15 Cox, C. C. 624, 14 Q. B. Div. 273, Beale's Cas. 357; ante, § 82.

necessary in order to prevent a felony attempted by violence or surprise.

As was shown in a previous section, a man may kill another, if necessary, in order to prevent him from committing a felony by violence or surprise, as burglary, arson, and robbery.[520] But in no other case is a homicide in defense of property either justifiable or excusable. We have seen that it is not justifiable in order to prevent a secret felony like larceny.[521] And, *a fortiori*, is never justifiable or excusable in order to prevent a mere trespass upon property, real or personal.[522] A man, however, in defense of his

[520] Ante, § 268a.

[521] Ante, § 268d.

[522] Reg. v. Murphy, 1 Craw. & D. 20, Beale's Cas. 318; Reg. v. Archer, 1 Fost. & F. 351; Storey v. State, 71 Ala. 330; State v. Moore, 31 Conn. 479; Harrison v. State, 24 Ala. 67, 60 Am. Dec. 450; McDaniel v. State, 8 Smedes & M. (Miss.) 401, 47 Am. Dec. 93.

This principle is illustrated in cases where a man sets a spring gun in his house or on his land. He may do so in his dwelling house, so that it will be discharged, and kill one who attempts to break and enter in the night for the purpose of committing a felony, as this is to prevent burglary,—a forcible felony. But a man cannot set a spring gun on his land so that it will kill mere

property, may use all necessary force short of taking life or inflicting great bodily harm,[523] and, if he unintentionally causes death, the homicide may be excusable as an accident, instead of amounting to manslaughter.[524] Or if it becomes necessary for him to kill his adversary in order to save himself from death or great bodily harm, the homicide will be excusable, if not justifiable.[525]

287. Defense of Habitation.

It has become a maxim of the common law that a man's house is his castle, but this expression is not to be taken as meaning that a man may under any and all circumstances kill in defense of his dwelling house. A man is not bound to retreat from his house. He may stand his ground there, and kill any person who attempts to commit a felony therein,

---

trespassers. Nor can he, at common law, set a spring gun in his shop or warehouse, so as to kill one who attempts to break and enter, for this is not burglary at common law, but a mere trespass. State v. Moore, 31 Conn. 479, 83 Am. Dec. 159. Compare Gray v. Combs, 7 J. J. Marsh. (Ky.) 478.

[523] Ante, § 214.

[524] Ante, § 274.

[525] Ante, § 274 et seq. See White v. Territory, 3 Wash. T. 397.

or who attempts to enter by force for the purpose of committing a felony, or of inflicting great bodily harm upon an inmate. In such a case the owner or any member of the family, or even a lodger in the house, may meet the intruder at the threshold, and prevent him from entering by any means rendered necessary by the exigency, even to the taking of his life, and the homicide will be justifiable.[526] The doctrine, however, does not justify a homicide merely to prevent a trespass upon the habitation, when it is evident that there is no intention to commit a felony, or to inflict great bodily harm upon an inmate.[527] Of course, in defending his habita-

[526] Cooper's Case, Cro. Car. 544, Beale's Cas. 347; State v. Patterson, 45 Vt. 308, 12 Am. Rep. 200, Beale's Cas. 348; State v. Middleham, 62 Iowa, 150.

[527] Cook's Case, Cro. Car. 537; Meade's Case, 1 Lewin, C. C. 184; Wild's Case, 2 Lewin, C. C. 214, Beale's Cas. 347; State v. Patterson, 45 Vt. 308, 12 Am. Rep. 200, Beale's Cas. 348; Carroll v. State, 23 Ala. 28, 36, 58 Am. Dec. 282. See, also, Patten v. People, 18 Mich. 314, 100 Am. Dec. 173; Greshia v. People, 53 Ill. 295.

"The idea embraced in the expression that a man's house is his castle is not that it is his property, and that, as such, he has the right to defend

tion, a man must act upon appearances, and if he acts in the *bona fide* and reasonable belief that the assailant intends a felony or great bodily harm to an inmate, and kills him to prevent his entry, the homicide is not criminal.[32a] Strictly speaking, however, it is not justifiable in such a case, but is merely excusable because of the mistake of fact.

---

and protect it by other and more extreme means than he might lawfully use to protect his shop, but the sense in which the house has a peculiar immunity is that it is sacred for the protection of his person and of his family." Per Barrett, J., in State v. Patterson, supra.

In a Michigan case, while it was held that a homicide committed by a man in attempting to compel a riotous assemblage about his dwelling house in the night time to leave is not justifiable or excusable, where no violence has been done or attempted by them, either against the house or the inmates, it was held that, if an inmate is ill, and in such a condition that the noise that is being made by the rioters may cause his death, and the rioters are informed or know of this circumstance, or if the noise renders it impossible to inform them, a homicide is justifiable, if necessary to compel them to leave or desist. Patten v. People, 18 Mich. 314, 100 Am. Dec. 173.

[32a] State v. Patterson, supra. And see Greschia v. People, 53 Ill. 295; Patten v. People, 18 Mich. 314, 100 Am. Dec. 173.

A man may eject a trespasser from his house, but in doing so he is not justified in using any more force than is necessary. If he unnecessarily kicks a trespasser in turning him out, his act is unlawful, and, if death results, he is guilty of manslaughter.[529]

(5) DEFENSE OF OTHERS.

288. In General.—A person has the same right, but only the same right, to defend one towards whom he occupies a family relation, as he would have to defend himself under the same circumstances. Even a stranger may take life, if necessary, in order to prevent the commission of a felony by violence or surprise.

It has been shown in a previous chapter that a person may be justified in interfering in defense of others than himself.[530] This is true in cases of homicide. A master may kill in defense of his servant to the same extent as he may kill in his own defense, and *vice versa*.[531] The same is true of husband and wife, and parent and child, and of other

---

[529] Wild's Case, 2 Lewin, C. C. 214, Beale's Cas. 347.

[530] Ante, § 81.

[531] 1 East, P. C. 289, 290, Beale's Cas. 343; Anon., Year Book 21 Hen. VIII., 39, pl. 50; Pond v. People, 8 Mich. 150.

persons occupying a family relation towards each other.[532] The right of a person to kill in defense of another, however, is subject to the same limitations as the right to kill in self-defense. A man cannot kill another in defense of his parent, child, brother, or servant, etc., unless there is a reasonably apparent necessity for the homicide in order to prevent death or great bodily harm, or in order to prevent some felony, like rape or robbery, attempted by violence or surprise.[533] A husband, father, or brother is not justified in killing another to prevent the seduction or debauching of his wife, daughter, or sister by artifice or fraud, for this may be prevented by other means.[534] So, where one of two brothers is in fault in bringing on a difficulty with a third person, the other brother cannot kill in his defense unless he has endeavored

[532] Reg. v. Rose, 15 Cox, C. C. 540, Beale's Cas. 343. See, also, 1 Hale, P. C. 448; 4 Bl. Comm. 186; Campbell v. Com. 88 Ky. 402, 21 Am. St. Rep. 348; Patten v. People, 18 Mich. 314, 100 Am. Dec. 173.

[533] People v. Cook, 39 Mich. 236, 33 Am. Rep. 380, Beale's Cas. 345.

[534] People v. Cook, supra.

in good faith to withdraw from the conflict.[535]

As we have seen, any one, even a stranger, may interfere and kill another to prevent the commission of a felony by violence or surprise, as murder, rape, robbery, etc.[536] A lodger in a house may kill another, if necessary, in order to prevent him from committing burglary or arson.[537]

VII. ABORTION.

289. Definition.—It is a misdemeanor at common law to procure the miscarriage of a woman after she is quick with child, with or without her consent, unless it is necessary, or reasonably believed to be necessary, to save her life. By the weight of authority it is not an offense at all to cause a miscarriage before the child has quickened, but this has very generally been remedied by statute.

290. At Common Law.

For the purpose of inheritance, an infant in its mother's womb is regarded as a person in being before it has quickened; but in the

---

[535] Smurr v. State, 105 Ind. 125; State v. Greer, 22 W. Va. 800.

[536] Ante, § 268.

[537] Cooper's Case, Cro. Car. 544, Beale's Cas. 347.

criminal law it is not recognized, unless by statute, until it has quickened. At common law, therefore, a woman who takes drugs or uses an instrument upon herself, and so causes a miscarriage, before she is quick with child, is not guilty of any crime for which she can be punished. And the rule is the same where a physician or other person procures a miscarriage with the woman's consent. If a woman is not quick with child, one who uses an instrument or administers a drug, without her consent, for the purpose of procuring a miscarriage, is guilty of an assault and battery. And if she dies in consequence, he is guilty either of murder or manslaughter, whether she consented or not, on the ground that he has done an act, without lawful purpose, dangerous to life, or at least an unlawful act. But if the woman consents, and does not die, he is guilty of no crime at all. This principle is well settled at common law.[538] And since procuring a miscarriage, with the woman's consent, before the child has quickened, is no offense, it follows

[538] Com. v. Parker, 9 Metc. (Mass.) 263, 43 Am. Dec. 396; Com. v. Bangs, 9 Mass. 387; State v. Cooper, 22 N. J. Law, 52, 51 Am. Dec. 248;

that an attempt under such circumstances is not indictable.[539]

After a child has quickened in the womb, it is within the protection of the criminal law, and it is a high misdemeanor for the mother to destroy it by the use of drugs or instruments, so that it is born dead, or for a third person to destroy it, either with or without her consent.[540] If the child dies in the process of delivery, or after delivery, but before an independent circulation has been established, the offense is merely a misdemeanor.

Abrams v. Foshee, 3 Iowa, 274, 66 Am. Dec. 77; Mitchell v. Com., 78 Ky. 204, 39 Am. Rep. 227.

There are several decisions holding that it is an offense at common law to procure an abortion before the child has quickened. They are not based, however, upon any authority at common law, but proceed upon a consideration of what the law ought to be, which is a question for the legislature, and not for the courts. See Mills v. Com., 13 Pa. St. 633, followed in State v. Slagle, 83 N. C. 630.

[539] Ante, § 129; State v. Cooper, 22 N. J. Law, 52, 51 Am. Dec. 248.

[540] See the cases above cited. And see 3 Inst. 50; 1 Hale, P. C. 433; 1 Hawk. P. C. c. 31, § 16; Holliday v. People, 9 Ill. 111; Smith v. State, 33 Me. 48, 54 Am. Dec. 607; Evans v. People, 49 N. Y. 86.

Procuring a mis-
has quickened has
a crime by statute.
the reign of George
nized the common-l
procuring an abort
the child a capital
mon law it was a mi
curing a miscarriag
the child a felony c
The distinction has
some of the statutes
ing it a crime to pr
the child has qui
however, make no di
der a statute making

---

[541] Ante, § 234b.

[542] See State v. Fitzg
Rep. 148; Eckhardt v. I
Rep. 462; Com. v. Tibb
v. Howard, 32 Vt. 380.
ute, the child must h

ister a drug or use an instrument "with intent to produce a miscarriage of any pregnant woman," it is not necessary that the woman shall be quick with child.[543]

Under a statute punishing any one who shall use an instrument "with intent to destroy the child of which a woman may be pregnant, and shall thereby destroy such child before its birth," the intent to destroy the child is an essential element of the offense, and an indictment under the statute is fatally defective if it fails to allege such intent.[544]

292. Justification and Excuse.

It is no offense at common law to procure an abortion, if it is done in order to save the life of the woman, and is necessary, or reasonably believed to be necessary, in order to save her life. It is generally expressly so provided in the statutes punishing abortion. If the exception is not expressly stated, it

---

various states, 1 Am. & Eng. Enc. Law (2d Ed.) 188 et seq.

[543] State v. Fitzgerald, 49 Iowa, 260, 31 Am. Rep. 148.

[544] Smith v. State, 33 Me. 48, 54 Am. Dec. 607; Lohman v. People, 1 N. Y. 379, 49 Am. Dec. 340.

must be implied, for the statute must be read in the light of the common law.[545] Generally speaking, there must be a criminal intent. To cause a miscarriage by accident is no offense.[546]

VIII. RAPE.

293. Definition.—Rape is a felony at common law. It consists in having unlawful carnal knowledge of a woman by force and without her consent.

294. Force and Want of Consent.

Rape is defined by East as "the unlawful carnal knowledge, by a man, of a woman, forcibly and against her will,"[547] and by Hawkins as "unlawful and carnal knowledge of a woman by force and against her will."[548] The expression "against her will,"

---

545 See State v. Fitzporter, 93 Mo. 390; Bassett v. State, 41 Ind. 303; State v. Stokes, 54 Vt. 179; Hatchard v. State, 79 Wis. 357.

Advice of a physician, if acted upon in good faith, is generally a defense. State v. Meek, 70 Mo. 355, 35 Am. Rep. 427. In Wisconsin, however, the advice of two physicians is required by the statute. See Hatchard v. State, 79 Wis. 357.

546 Slattery v. People, 76 Ill. 217.

547 1 East. P. C. 434.

548 1 Hawk. P. C. c. 16, § 2, Beale's Cas. 419. See, also, 2 Inst. 180; Co. Litt. 123 b.

however, in these and other definitions, means simply "without her consent," and the latter expression has been substituted in modern statutes.[549] Any man who has unlawful carnal knowledge of a woman by force, and without her conscious consent or permission, is guilty of rape, both at common law and under the statutes.[550] All the authorities

[549] In a Massachusetts case it was said: "All the statutes of England and of Massachusetts, and all the text-books of authority which have undertaken to define the crime of rape, have defined it as the having carnal knowledge of a woman by force and against her will. The crime consists in the enforcement of a woman without her consent. The simple question, expressed in the briefest form, is, Was the woman willing or unwilling? The earlier more weighty authorities show that the words 'against her will,' in the standard definitions, mean exactly the same thing as 'without her consent,' and that the distinction between these phrases, as applied to this crime, which has been suggested in some modern books, is unfounded." Per Gray, J., in Com. v. Burke, 105 Mass. 376, 7 Am. Rep. 531, Beale's Cas. 457.

[550] In addition to the authorities above cited, see Steph. Dig. Crim. Law, art. 254; Reg. v. Camplin, 1 Den. C. C. 89; State v. Pickett, 11 Nev. 255, 21 Am. Rep. 754; Croghan v. State, 22 Wis. 445; Don Moran v. People, 25 Mich. 356, 12 Am. Rep. 283.

agree that this offense involves want of consent on the part of the woman. If she consciously consents to the act of intercourse, however tardily or reluctantly, and however persistently she may resist for a time, the act is not rape,[551] provided she is of such an age and condition as to be capable of giving a valid consent.[552] In many of the cases it has been said that, to make the act rape, the woman must have resisted "to the uttermost."[553] In a New York case it was said that "resistance must be up to the point of being overpowered by actual force, or of in-

[551] Reg. v. Barrow, L. R. 1 C. C. 156, Beale's Cas. 455; Reg. v. Hallett, 9 Car. & P. 748; People v. Dohring, 59 N. Y. 374, 17 Am. Rep. 349; Com. v. Burke, 105 Mass. 376, 7 Am. Rep. 531, Beale's Cas. 457; Whittaker v. State, 50 Wis. 518, 36 Am. Rep. 856; State v. Murphy, 6 Ala. 765, 41 Am. Dec. 79; State v. Shields, 45 Conn. 263; People v. Crosswell, 13 Mich. 427, 87 Am. Dec. 774; Charles v. State, 11 Ark. 389; Pleasant v. State, 13 Ark. 360; Brown v. Com., 82 Va. 653; Bean v. People, 124 Ill. 576; Strang v. People, 24 Mich. 1; Woodin v. People, 1 Park Cr. R. (N. Y.) 464.

[552] Post, §§ 295, 298.

[553] People v. Abbot, 19 Wend. (N. Y.) 192; People v. Dohring, 59 N. Y. 374, 17 Am. Rep. 349; People v. Crosswell, 13 Mich. 427, 87 Am. Dec. 774.

ability, from loss of strength, longer to resist, or, from the number of persons attacking, resistance must be dangerous or absolutely useless, or there must be duress or fear of death."[554]

295. Women Non Compos Mentis, Insensible, or Asleep.

There is an apparent exception to the rule that force and want of consent are essential to rape in the case of intercourse with women who are insane, idiotic, insensible, or asleep at the time of the act; but the exception is only apparent, for in such cases there can be no consent, and there is sufficient force in accomplishing the act. If a woman is asleep, or is so insane or imbecile that she does not know the nature of the act, intercourse with her is rape, though she does not resist.[555]

[554] People v. Dohring, 59 N. Y. 374, 17 Am. Rep. 349.

[555] Reg. v. Fletcher, Bell C. C. 63; Reg. v. Barratt, L. R. 2 C. C. 81; Reg. v. Mayers, 12 Cox, C. C. 311; Harvey v. State, 53 Ark. 425; State v. Atherton, 50 Iowa, 189, 32 Am. Rep. 134.

The woman must be so insane or imbecile as not to know the nature of the act. See Reg. v. Fletcher, L. R. 1 C. C. 39; People v. Crosswell, 13 Mich. 427, 87 Am. Dec. 774; Bloodworth v. State, 6 Baxt. (Tenn.) 614, 32 Am. Rep. 546.

For the same reason, unlawful intercourse with a woman who is reduced to a state of insensibility by intoxicating liquors or drugs is rape, if the liquors or drugs were administered by the accused, or by another with his cognizance.[556]

296. Consent Induced by Intimidation.

Another apparent exception to the rule requiring force and want of consent in rape is in cases where the woman's consent is induced, or resistance prevented, by fear of personal violence threatened by the man. All of the authorities agree that a man is guilty of rape if he so overpowers a woman by threats and an array of force that she does not dare to resist, and has intercourse with her under such circumstances, for there is no real consent in such a case.[557]

---

[556] Reg. v. Camplin, 1 Den. C. C. 89, 1 Cox, C. C. 220, 1 Car. & K. 746; Com. v. Burke 105 Mass. 376, 7 Am. Rep. 531, Beale's Cas. 457. See, also, Reg. v. Ryan, 2 Cox, C. C. 115; Anon., 8 Cox, C. C. 134; Reg. v. Fletcher, L. R. 1 C. C. 39, 10 Cox, C. C. 248.

[557] Doyle v. State, 39 Fla. 155, 63 Am. St. Rep. 159; Rice v. State, 35 Fla. 236, 48 Am. St. Rep. 245; State v. Shields, 45 Conn. 263; Felton v. State, 139 Ind. 531; Reg. v. Hallett, 9 Car. & P. 748. Compare Whittaker v. State, 50 Wis. 518, 36 Am. Rep. 856.

297. Consent Induced by Fraud.

Some of the courts have recognized a further exception to the rule requiring force and want of consent in cases in which the woman's consent is obtained by fraud. On this question, however, there is a conflict in the decisions. It has been held that if a woman is fraudulently induced to submit to sexual intercourse, when she does not understand the nature of the act, as where a physician fraudulently induces a girl to submit to intercourse with him by pretending that it is necessary and proper surgical treatment, the act is rape.[558] But by the weight of authority, if a woman consents to sexual intercourse with a man, understanding the nature of the act, the man is not guilty of rape, though her consent may have been obtained by false and fraudulent pretenses.[559] According to this

[558] Reg. v. Flattery, 13 Cox, C. C. 388, 46 L. J. M. C. 130; Reg v. Stanton, 1 Car. & K. 415; Reg. v. Camplin, 1 Den. C. C. 89. See, also, Pomeroy v State, 94 Ind. 96, 48 Am. Rep. 146.

[559] Reg. v. Barrow, L. R. 1 C. C. 156, 11 Cox, C. C. 191, Beale's Cas. 455; Reg. v. Fletcher, L. R. 1 C. C. 39, 10 Cox, C. C. 248; Don Moran v. People, 25 Mich. 356, 12 Am. Rep. 283; Wyatt v. State, 2 Swan (Tenn.) 394; State v. Murphy, 6 Ala.

view, most of the courts in which the question has arisen have held that a man is not guilty of rape in having carnal knowledge of a woman by falsely personating her husband.[560] For the same reason, if a woman consents to intercourse in the belief that an illegal marriage with the man is legal, upon his fraudulent representation to that effect, he is not guilty of rape.[561]

298. Carnal Knowledge of Children.

It seems that under the old common law it was not regarded as rape to have carnal knowledge of a child, however young, if she consented.[562] By an early English statute,

765, 41 Am. Dec. 79; Com. v. Fields, 4 Leigh (Va.) 648; Bloodworth v. State, 6 Baxt. (Tenn.) 614, 32 Am. Rep. 546.

[560] Reg. v. Barrow, L. R. 1 C. C. 156, 11 Cox, C. C. 191, Beale's Cas. 455; Reg. v. Barratt, L. R. 2 C. C. 81; Reg. v. Clarke, Dears. C. C. 397; Rex v. Jackson, Russ. & R. 487; Wyatt v. State, 2 Swan (Tenn.) 394; State v. Brooks, 76 N. C. 1. Contra, People v. Metcalf, 1 Whart. C. C. 378; State v. Shepard, 7 Conn. 54; Reg. v. Dee, 15 Cox, C. C. 579, L. R. 14 Ir. 468.

[561] State v. Murphy, 6 Ala. 765, 41 Am. Dec. 79. And see Bloodworth v. State, 6 Baxt. (Tenn.) 614, 32 Am. Rep. 546.

[562] Reg. v. Read, 1 Den. C. C. 377; Reg. v. Webb,

however, it was made a felony to have carnal knowledge of a child under the age of ten years, whether with or without her consent.[563] Similar statutes have been enacted in this country.[564] In some states the statute punishes the carnal knowledge of girls of as much as sixteen years of age, or even more, either with or without their consent.[565] In a few cases it has been held that, even independently of any statute, a child under ten years of age is incapable of consenting to sexual intercourse, and that it is rape at common law for a man to have intercourse with her with her consent.[566]

299. The Carnal Knowledge.

(*a*) *Penetration.*—To constitute rape,

---

2 Car. & K. 937; Reg. v. Martin, 9 Car. & P. 213; Reg. v. Meredith, 8 Car. & P. 589.

[563] 18 Eliz. c. 7, § 4; 1 Hale, P. C. 628; 1 East. P. C. 436. See Reg. v. Cockburn, 3 Cox, C. C. 543.

[564] See Com. v. Roosnell, 143 Mass. 32; Hays v. People, 1 Hill (N. Y.) 351.

[565] Farwell v. State, 54 N. J. Law, 416; State v. Wright, 25 Neb. 38. And see State v. Tilman, 30 La. Ann. 1249, 31 Am. Rep. 236; Lawrence v. Com., 30 Grat. (Va.) 845; State v. Hatfield, 75 Iowa, 592; Com. v. Murphy, 165 Mass. 66, 52 Am. St. Rep. 496.

[566] See People v. McDonald, 9 Mich. 149.

carnal knowledge is essential. It is necessary, therefore, that there shall be some penetration of the female organ by the male.[567] The slightest penetration, however, is sufficient.[568]

(*b*) *Emission.*—In a case decided in England in 1781, emission was held to be necessary, as well as penetration, on the ground that there could not be carnal knowledge without it.[569] Prior to this decision, emission was not regarded as necessary,[570] and it has since been declared unnecessary by statute. In this country some of the courts have fol-

---

[567] 3 Inst. 60; 1 Hale, P. C. 628; Rex v. Allen, 9 Car. & P. 31; Reg. v. Jordan, 9 Car. & P. 118; Hardtke v. State, 67 Wis. 552; Wesley v. State, 65 Ga. 731.

[568] 3 Inst. 59; Rex v. Allen, supra; Reg. v. Jordan, supra; Rex v. Russen, 1 East, P. C. 438; Reg. v. Lines, 1 Car. & K. 393; Com. v. Thomas, 1 Va. Cas. 307; Waller v. State, 40 Ala. 325; Stephen v. State, 11 Ga. 225; State v. Hargrave, 65 N. C. 466; People v. Crowley, 102 N. Y. 234 ~~240~~; Word v. State, 12 Tex. App. 174. See note, 80 Am. Dec. 362.

[569] Hill's Case, 1 East, P. C. 439. And see Rex v. Burrows, Russ. & R. 519.

[570] See 1 East, P. C. 436-440.

lowed the English case above mentioned;[571] but most of them have recognized the earlier doctrine, and have held penetration, without emission, sufficient, or else statutes have been enacted expressly declaring it unnecessary.[572]

300. Unlawfulness of Intercourse—Husband and Wife.

Since rape is "unlawful" carnal knowledge of a woman, it follows that a man cannot be guilty of this offense by having carnal knowledge of his wife, and it can make no difference that he does so by force and against her will.[573] Nor can a man be guilty of an attempt to rape his wife, or of an assault with intent to rape her.[574] He may, however, be guilty as a principal in the second

---

[571] State v. Gray, 8 Jones (N. C.) 170; State v. Hargrave, 65 N. C. 466; Williams v. State, 14 Ohio, 222, 45 Am. Dec. 536; Blackburn v. State, 22 Ohio St. 102; Noble v. State, 22 Ohio St. 541.

[572] State v. Shields, 45 Conn. 256; Pennsylvania v. Sullivan, Add. (Pa.) 143; Waller v. State, 40 Ala. 325; Comstock v. State, 14 Neb. 205; Osgood v. State, 64 Wis. 472; People v. Crowley, 102 N. Y. 234.

[573] 1 Hale, P. C. 629.

[574] Ante. § § 129, 210.

degree, or as an accessary before the fact, in procuring the rape of his wife by another man, or in aiding or abetting another in committing the offense.[575]

301. Persons upon Whom Rape may be Committed.

As has just been stated, a man cannot rape his wife, since intercourse between husband and wife is not unlawful. Subject to this qualification, any female may be the subject of rape. It is not necessary, as has sometimes been contended, that she shall have reached the age of puberty.[576] Nor is it necessary that she shall have been chaste. The fact that she was not chaste may aid, as a matter of evidence, in showing that she consented, but it does not, as a matter of law, prevent the intercourse from being rape, if it was in fact accomplished by force and without her consent.[577]

302. Persons Incapable of Committing Rape.

(*a*) *Boys under Fourteen.*—In England, at common law, a boy under fourteen years

575 Ante, § 191.

576 1 Hale, P. C. 630; 1 East, P. C. 435.

577 State v. Long, 93 N. C. 542; Higgins v. People, 1 Hun (N. Y.) 307.

of age was conclusively presumed to be physically incapable of committing rape, and no evidence could be introduced to show capacity in fact.[578] In this country the same rule has been held by some of the courts.[579] Others have repudiated it, however, on the ground that in this country boys do, as a matter of fact, sometimes reach the age of puberty before they are fourteen, and that, as the reason for the rule does not exist, the rule is not applicable. Most of these courts have held that there is a presumption of incapacity, but that the presumption may be rebutted by affirmatively showing capacity in fact.[580] In

---

[578] 1 Hale, P. C. 630; Steph. Dig. Crim. Law, art. 254; Rex v. Eldershaw, 3 Car. & P. 396; Rex v. Groombridge, 7 Car. & P. 583; Reg. v. Philips, 8 Car. & P. 736.

[579] State v. Sam, 1 Winst. (N. C.) 300; State v. Pugh, 7 Jones (N. C.) 61; Stephen v. State, 11 Ga. 225; Williams v. State, 20 Fla. 777.

[580] Williams v. State, 14 Ohio, 222, 45 Am. Dec. 536; Hiltabiddle v. State, 35 Ohio St. 52, 35 Am. Rep. 592; Wagoner v. State, 5 Lea (Tenn.) 352, 40 Am. Rep. 36; People v. Randolph, 2 Park Cr. R. (N. Y.) 174; People v. Croucher, 2 Wheeler, C. C. (N. Y.) 42; Heilman v. Com., 84 Ky. 457, 4 Am. St. Rep. 207; State v. Handy, 4 Harr. (Del.) 566.

The fact that a statute makes the crime com-

Louisiana the court has gone further, and has held that there is not even a presumption of incapacity.[581]

(*b*) *Impotency.*—An impotent man, if incapable of copulation, cannot commit rape, but if he is capable of penetration, and merely incapable of emission or procreation, he may commit the offense, for, as we have seen, penetration, without emission, is sufficient.[582]

---

plete on proof of penetration only, without proof of emission, does not change this rule. Hiltabiddle v. State, supra.

[581] State v. Jones, 39 La. Ann. 935.

[582] Nugent v. State, 18 Ala. 521. And see Hiltabiddle v. State, 35 Ohio St. 52, 35 Am. Rep. 592.